Fit for Purpose? Copyright for Publishers in the Digital Age

Aislinn O'Connell

January 2016

Centre for Publishing
Department of Information Studies
University College London

A thesis submitted for the degree of Doctor of Philosophy in
University College London

I, Aislinn O'Connell, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

_____

Abstract

The digital revolution was an almost unprecedented shift in the way humans communicate and interact, bringing with it ease of communication and sharing of copyright content. This thesis answers the question of whether copyright as it stands in the mid-2010s is still a valid bundle of rights to ensure that authors and creators maintain control over their creative works, while still allowing the sharing of creative works and ensuring the spread of knowledge. It approaches the question of copyright from several contexts – including the legal and enforcement mechanisms which have developed in response to the digital shift, and the rise of digital piracy, including graduated response, notice and takedown, and website blocking. A second approach is considering the economic and financial standpoint of the creative industries, particularly the publishing industries. It includes a survey into the economic contribution of the core copyright industries based on guidelines from the World Intellectual Property Organization, as well as assessing a variety of economic reports published in the early 2010s. From there, the thesis considers the case study of the UK text and data mining and private copying exceptions as examples of interventionist legislation which attempt to deal with the rise of digital. Finally, the thesis considers the implementation of shared, non-legislative initiatives which have attempted to approach copyright from different perspectives to the rigid approach of legislative intervention. The thesis concludes by suggesting that adaptation to new norms is possible without the need for extensive reform of copyright, provided that all parties involved are willing to take a flexible view of the change that digital has wrought upon the copyright landscape.

Acknowledgements

Thanks are due to so many, it is difficult to know where to start!

To my supervisory team, Professor Iain Stevenson and The Rt Hon Professor Sir Robin Jacob, who were by turns my supervisors, best encouragement, and strictest critics, offering advice, support, commentary, and reassurance when needed. I could not have done this without your generosity of both time and expertise.

To the Stationers Foundation, who generously sponsored my PhD project, and the agencies behind it, thanks are due also – the PLS, CLA, NLA, Pearson, and Euromonitor. The support was more than just financial, and I was lucky to be able to draw on the knowledge, experience and expert advice of Sarah Faulder, Kevin Fitzgerald, Simon Juden, Tori Eva, David Pugh, Ian Locks, and Trevor Fenwick at every opportunity. This project would not exist without your aid.

To my friends, who were the source of much advice, encouragement, and recommendations, often in the form of chocolate – Kellie, Darren, Kyle, Rob, Mark, Kristi, Amber, Inga, and June – your reassurance and empathy (and provision of sweets) was invaluable.

To Ronan, who bore the brunt of my complaints in the final stages, allowed me to cry on him, and was generally wonderful, calming, steady, supportive, and an Oxford comma – I cannot thank you enough.

And finally to my parents and siblings, who provided everything from encouragement to a roof over my head, from proofreading services, to patiently acknowledging my complaints when I struggled – I am beyond lucky to have such a wonderful, supportive, loving family and could not ask for better.

Thank you. I could not have done this without you.

Table of Contents

Table of Contents

Table of Figures

Introduction

> Only one thing is impossible for God: To find any sense in any copyright law on the planet.
>
> Mark Twain[1]

Copyright is the set of legal rights which attach to creative works around the world, grant creators the ability to control their works and allows certain uses by others. It is one of many intellectual property rights (IPRs), along with trademarks, patents, and others. IPRs grant ownership over intangible property in ways which are similar to physical property rights – IPRs allow the control of the reproduction and distribution of intangible property. This can take forms as diverse as the right to control the distribution of the sheet music of a symphony and the requirement to have used certain ingredients in a particular process before a floury bap may be called a Waterford Blaa.[2] Copyright is generally a set of rights relating to creative content, allowing the creator control over the reproduction and distribution of their works. It was first legislated for in the UK in 1710, has gone through many incarnations since its inception, evolving from a right which controlled the copying of books and newspapers to a complex suite of rights and exceptions which apply to a range of creative content. The main categories to which copyright attaches are:

- original literary works, such as novels or poems, tables or lists and computer programmes
- original dramatic works, such as dance or mime
- original musical works, ie the musical notes themselves
- original artistic works, such as graphic works (paintings, drawings etc), photographs and sculptures
- sound recordings
- films
- broadcasts; and
- typographical arrangements (ie the layout or actual appearance) of published editions[3]

Copyright is unusual amongst IPRs in that it does not need to be registered to exist – copyright comes into existence automatically at the creation of a work. Although copyright is time-limited, the length of time which copyright applies for is very long – in the UK it generally lasts for the life

---

[1] Mark Twain, 'Mark Twain's Notebook', 1902-1903.
[2] Commission, 'Implementing Regulation (EU) No 1164/2013 of 7 November 2013 entering a name in the register of protected designations of origin and protected geographical indications [Waterford Blaa/Blaa (PGI)]' OJ L309/15.
[3] CLA 'Copyright Information' (*CLA.co.uk*) <http://www.cla.co.uk/copyright_information/copyright_information> accessed 21 December 2015; paraphrasing Copyright, Designs and Patents Act 1988, ss 3-8 (CDPA).

of the author, plus seventy years after the year of their death (post mortem auctoris – pma). After this, the work will fall into the public domain, meaning that it can be used or reused by anyone, without the need to seek permissions. The original owner of the copyright in a work is generally the author – the writer of a book, article, or manuscript, the photographer or artist, the producer of a film. One major exception to this is works created in the course of employment – in this case, the copyright belongs to the employer.[4] This copyright can then be bought, sold, licensed, or given away.

The digital revolution, starting in the late 20th century and stretching to the present day, is one of many ages of man which have heralded great change. At the time of the invention of the modern computer, nobody had any idea of the impact which it would have on the world. Charles Darwin, the grandson of the evolutionary theorist, stated in 1946 'it is very possible that ... one machine would suffice to solve all the problems that are demanded of it from the whole country'[5] and the internet is rife with stories of great technologists stating that there would be a world need for no more than five or six computers.[6] They could not have been more wrong. This particular author has six different computing devices which she uses on a daily basis. The proliferation and accessibility of computers has had a knock-on effect in the world of content – films, TV shows, books, music, albums, music videos and a variety of other content are available digitally, together with a variety of covers, remixes, parodies, fan art and fiction, and other derivative works. The development of technologies such as peer-to-peer (P2P) sharing and online file storage, together with the widespread availability of cheap and efficient storage media mean that obtaining and storing digital media is easier than ever before. This also means that it is often easier (and certainly cheaper) than legally obtaining creative content such as books, DVDs or CDs, or their digital equivalents. Furthermore, cultural expectations have changed with the advent of such ease of sharing – consumers expect not only to be able to access creative works,[7] but also to see clips online, share images of TV shows and films, create derivative works such as fan-made videos and

---

[4] CDPA (n 3), ss 9-11.
[5] See B Jack Copeland, *Colossus: The First Electronic Computer: The secrets of Bletchley Park's Code-breaking computers* (2006 OUP).
[6] Variously attributed to Thomas J Watson, CEO of IBM, Cambridge Mathematician Douglas Hartree, and others. Most reliably, Howard H Aiken, the designer of early IBM computers, physicist, and computing pioneer, stated that a 'half dozen large computes ... would take care of all requirements we had throughout the country', I Bernard Cohen, *Howard Aiken: Portrait of a Computer Pioneer* (1999 MIT Press) 292.
[7] European Commission, 'Creating a Digital Single Market: Bringing Down Barriers to Online Opportunities' (2015) <http://europa.eu/rapid/attachment/IP-15-6261/en/Factsheet_1_PORTABILITY_FINAL.pdf> accessed 11 December 2015.

fanfiction[8], make and distribute fan art, and a host of other activities. Copyright, by its nature, is essentially uncountable, as it attaches to so many kinds of artistic works and expressions. Although artistic expression was never limited, the ability to create and share works was historically limited – the necessity of finding a publisher or distributor for one's work meant that the reproduction or sharing of creative content was not an issue of concern for most – the creative industries certainly had issues with piracy, but not on the unprecedented scale which arrived with the digital revolution. This ease of sharing, then, has created a new quandary for the creative industries, as well as those who consume the content created by them – is copyright, a three hundred year old property right, fit for purpose for publishers in the digital age?

Fit for purpose is defined in the OED as 'suitable for the intended use; fully capable of performing the required task.'[9] In the context of copyright being fit for purpose, it would mean that copyright is succeeding in supporting a creative economy and creative people in creating, producing, and distributing creative and copyright works, and granting them mechanisms of protecting those works. Copyright would be contributing to a profitable and functional market, without much difficulty in accessing published works. The notion of fit for purpose draws on Richard Hooper's Digital Copyright Exchange Feasibility study,[10] which considers the suitability of copyright licensing and is discussed later in this chapter.

Of course, in order to ascertain whether copyright is fit for purpose, it is necessary first to establish what the purpose of copyright and related rights actually is.

For those considering only US copyright law, the purpose of copyright may be easier to ascertain. The inclusion of the 'copyright clause' in the US Constitution helpfully points out that the reason for copyright provisions under US law is 'to promote the Progress of Science and useful Arts', although even this is not always accepted as indisputable, with some suggesting that the purpose of copyright is to protect creators.[11] Thus, even with a constitutional declaration of the purpose of

---

[8] Fanfiction is fan-written stories which take the characters or setting of an established media (eg Harry Potter) and write fiction based on that setting. Online fan work archive and archiveofourown.org hosts almost 2 million fan works (1982853 works at date of access): Archive of Our Own <https://archiveofourown.org/> accessed 11 December 2015.

[9] 'Fit, adj' (OED Online, *OUP* June 2016) < http://www.oed.com/view/Entry/70747?redirectedFrom=fit+for+purpose#eid130154137> accessed 27 June 2016.

[10] Richard Hooper, 'Rights and Wrongs: Is Copyright Licensing Fit For Purpose in the Digital Age?' (2012) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase1.pdf> accessed 14 December 2015

[11] See, for example, L Ray Patterson and Stanley W Lindberg, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press 1991): 'A recent article in Newsweek, for instance, asserts confidently,

copyright, that purpose is not necessarily always as clear-cut as it may seem. This sort of difficulty is replicated in the UK also.

If we look back to the origins of copyright, in the Statue of Anne,[12] the full title of the Act includes the phrase 'for the encouragement of learning', which would seem to indicate that the original legislative copyright was implemented with the purpose of encouraging education and learning – broadly similarly to the US's promotion of science and useful arts. This is unsurprising, given that early US copyright law was based on English law. However, given the development of copyright law in the following three hundred years, it is wise to look to something more recent in order to ascertain whether those same principles still hold true. In this case, we will look to the 2001 European InfoSoc Directive, which in the Recitals states that copyright and related rights 'protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.'[13]

This viewpoint, as stated in the EU Directive which achieved some harmonisation of European copyright, is broadly similar to the US and original English sentiments, and would seem to indicate that copyright and other IPRs are designed to promote the development of new products and services, through the protection of that content, and (presumably) enabling the creators of that content to make a living from their creations. Thus, from these definitions, a copyright regime which is fit for purpose is one which allows creators to make a living from those creative works, while also ensuring the adequate development and marketing of those creative works. After all, the livelihood of creators depends on their works being available and purchased by consumers – the balance between information and works being available, and allowing them to support their creators is a fine one, encompassing the interests of the public, the companies involved in publishing those works, and the creators.

Given firstly that this thesis focuses on publishing and secondly that the reasons given for a need for change in the copyright regime put forward by the Hargreaves Review focused on innovation

---

"The primary purpose of copyright law is to protect authors against those who would pilfer their work." But this is not copyright's announced purpose – even though protecting authors is indeed one of the incidental functions of copyright. [...] The primary purpose of copyright [...] is to promote the public welfare by the advancement of knowledge.' (Citing David A Kaplan, 'The End of History?' *Newsweek*, 25 December 1989)

[12] Copyright Act 1709 (8 Ann c 21 or 8 Ann c 19) (Statute of Anne).

[13] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive), Recital 2.

and economic benefit,[14] commenting on the need to strengthen and grow legitimate markets in copyright and other IP protected fields[15] presenting copyright and other IPRs as important to the UK economy,[16] the conception of fit for purpose put forward here relies largely on an economic justification for copyright. In doing so, it focuses on licensing copyright works, which allows publishers to obtain an economic benefit from distributing those works, and enforcement of copyright, which is necessary to continue to distribute copyright works. The focus of this thesis being on the question of whether copyright is fit for purpose, using the assertions of the Hargreaves Review and the subsequent Hooper investigations as a jumping-off point, the decision was made to accept the premise of copyright as put forward in the Hargreaves Review, and focus largely on the economic impact of copyright for the UK economy.

Thus, the thesis rejects the argument that copyright works are a public good,[17] in keeping with the argument put forward by Christopher S Yoo[18] and arguably supported by the Hargreaves Review, which makes reference to costs of reproduction[19] (which would contradict the public good belief that the marginal cost of making another copy is zero, a core proponent of its *nonrival* aspect) and enforcement[20] – which contradicts the second assumption of being *nonexcludable.* The thesis then focuses on copyright's economic impact and justifications, and does not overly concern itself with moral and artistic justifications for copyright.

This is not to say that there are no justifications to be made on these bases. Rather, due to the nature of the discussion and the Hargreaves Review, together with other materials considered in the literature review, this research project was not the appropriate place to go into those considerations.

This thesis answers the question of being fit for purpose by examining publishers and copyright in the UK from a number of angles. After an introduction to the basics of copyright in the early 2010s, it returns to consider copyright from a variety of perspectives, including legal and economic, in order to obtain a holistic understanding of how copyright has adapted to the challenges brought

---

[14] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) (Hargreaves Review).
[15] ibid 85.
[16] ibid 17.
[17] As suggested by Landes and Posner, 'An Economic Analysis of Copyright Law' (1989) 18(2) The Journal of Legal Studies 325,
[18] Christopher S Yoo, 'Copyright and Public Good Economics: A Misunderstood Relation' (2007) 155(3) University of Pennsylvania Law Review 635.
[19] Hargreaves (n 14) 13.
[20] ibid ch 8.

by the digital age; it considers the voluntary cooperative initiatives and oblique approaches to copyright which are possible within its complex, but flexible framework.

The thesis follows a pragmatic research paradigm.[21] It uses a mixed methods approach[22] which, rather than getting caught up in whether qualitative or quantitative methods are the 'right' approach, appreciates that a pragmatic approach can avoid the difficulty of falling into one or other classification and feeling required to stick specifically to that paradigm. Mixed methods for social research is by no means a new approach, but it is one which is appropriate in this particular context. It accepts multiple realities, and 'orients itself toward solving practical problems in the "real world."'[23]

The reason for the selection of this research paradigm is encapsulated in its name. As a choice of methodology, it was the most appropriate and pragmatic fit. The nature of this paradigm appealed to the author both for practicality and methodological fit reasons[24] – the ability to adapt social and research norms to fit the research is important when considering copyright, a set of rights which developed essentially independently in different territories over the course of hundreds of years and which even now does not have a single unified title. The freedom to consider differing approaches and use the research methods most appropriate to each specific approach[25] in order to fully appreciate the literature and research was an important part of the flexibility which improved both the approach and the project's understanding of copyright over the course of the research.

A mixed methods approach[26] was particularly important for this research project given the range of approaches which were taken to analyse the development and adaptation of copyright in response to the digital shift. While the empirical study conducted in Chapter 5 was necessarily completed following the methodology laid down by the WIPO Guidelines,[27] the use of other

---

[21] Martina Yvonne Feilzer, 'Doing Mixed Methods Research Pragmatically: Implications for the Rediscovery of Pragmatism as a Research Paradigm' (2010) 4(1) Journal of Mixed Methods Research 6.
[22] R Burke Johnson and Anthony J Onwuegbuzie, 'Mixed Methods Research: A Research Paradigm Whose Time Has Come' (2004) 33(7) Educational Researcher 14.
[23] ibid 8; citing John W Creswell and Vicki L Plano Clark, *Designing and conducting mixed methods research* (Sage 2007) 20-28; John Dewey, *Experience and nature* (Kessinger 1925); Richard Rorty, *Philosophy and social hope* (Penguin 1999).
[24] R Burke Johnson and Anthony J Onwuegbuzie, 'Mixed Methods Research: A Research Paradigm Whose Time Has Come' (2004) 33(7) Educational Researcher 14.
[25] Creswell and Plano Clark (n 23), 9, 'A need exists to generalize exploratory findings'.
[26] Charles Teddlie and Abbas Tashakkori, 'Mixed Methods Research: Contemporary Issues in an Emerging Field' in Norman K Denzon and Yvonna S Lincoln (eds) *The SAGE Handbook of Qualitative Research* (SAGE 2011).
[27] WIPO, 'Guide on Surveying the Economic Contribution of Copyright Industries' (2003) (WIPO Guidelines)

methodologies was vital to allow the greater aims of the project to be completed. Thus, for each chapter, the most pragmatic approach was taken. For the scoping part of the research project, loosely structured interviews were combined with literature searching and comparative literature studies, while for the legal chapters, comparative and doctrinal analysis was employed to assess the provision of the law in several territories to enforce copyright.[28] The freedom to allow these differing approaches in vastly different chapters was vital to the cohesion and scope of the project as a whole. Further, given the interdisciplinary nature of the research project, which situated itself in the discipline of Information Studies, but drew greatly on the legal structures which are so crucial for the proper functioning of a copyright regime which is efficient and profitable for all involved, the ability to use differing approaches in different points, as was necessary, was an important and indeed crucial part of the research.

Thus, several different methods were used for the completion of the research project as a whole. The WIPO Guidelines method is discussed in detail in the relevant chapter. A large proportion of this dissertation is concerned with the legal and practical implementation of copyright law and doctrine. Thus, for these chapters, a mixture of doctrinal and comparative law approaches was used. The comparative approach allowed for the investigation of several different legal regimes in the fourth and fifth chapters, while the doctrinal approach, described as 'mother's milk for lawyers',[29] allowed for an analytical approach to the development and operation of the copyright regime in chapter 3.

As part of the preliminary work for this doctoral project, meetings were conducted with representatives from NLA Media Access, the Copyright Licensing Agency, the Publishers Licensing Society, Euromonitor, and Pearson. In the first months of the project, these were scoping meetings which discussed potential issues which the thesis might cover, and what areas were of concern to the entities represented in the meetings. Over the course of the first year of the research project, half-days were spent in the offices of NLA Media Access, the CLA, the PLS, and Euromonitor observing the operation of the organisation, and discussing what they felt were the most relevant copyright issues for their operations.

---

[28] W Laurence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches: Quantitative and Qualitative Methods* (7th edn, Pearson 2010); James Mahoney, Dietrich Rueschemeyer, 'Comparative Historical Analysis: Achievement and Agendas' in James Mahoney, Dietrich Rueschemeyer (eds), *Comparative Historical Analysis in the Social Sciences* (CUP 2003).

[29] Christopher McCrudden, 'Legal Research and the Social Sciences', (2006) 122 Law Quarterly Review 632, 634.

In the second year of the project, two days were spent in the offices of the European Magazine Media Association and the European Newspaper Association (EMMA and ENPA) in Brussels. During this time, a meeting was also conducted with the Federation of European Publishers. A full day was spent in the offices of Pearson (including the Financial Times) in the same month. The purpose of all of these meetings was to ascertain which issues were most pressing for different entities in the publishing industries.

All of the above meetings could be described as loosely structured interviews which aimed to establish and elaborate on what those particular companies and bodies felt were the most pressing issues for publishers with regard to copyright in the digital age. Each meeting lasted roughly an hour, and was a largely free-form discussion on the issues surrounding copyright in the digital age, and how the representatives of each particular company thought of this as a concern. The original research plan considered several issues which were possibly of relevance to the publishing industry with regard to copyright.

The concerns which were raised in this meetings then informed, in part, how the original research plan was modified and carried out, both through justifying existing plans and adding extra aspects. The original research plan included the economic impact of copyright for content creators. This was strengthened by the concerns of the CLA, which pointed out the research that they had commissioned from Pricewaterhouse Cooper on similar topics, which is referenced in Chapter 5.

The text and data mining exception, on the other hand, was not specifically in the research plan as presented at the beginning of the research period. There was a more general inclusion of the Hargreaves exceptions as a whole. However, the TDM exception specifically was mentioned by EMMA, ENPA, the CLA, and the NLA as of concern to them, and thus the Hargreaves exception discussion was refined to focus more strongly on TDM, which was included as a case study in Chapter 6. Similarly, piracy was mentioned by Pearson, the PLS, and the PA as an area of concern. It was originally included on the basis that the topic of enforcement and disputes was the subject of an entire chapter in the Hargreaves Review.[30] The agreement of several publishers with this position then strengthened the case for including it in the research plan. While the Graduated Response systems discussed in Chapter 3 were largely sought and utilised by music and film companies, rather than publishers, and this could be therefore considered as a weakness of research centred around publishers, it is important to consider the range of piracy prevention measures which were implemented around the world in response to the rise in digital piracy, and

[30] Hargreaves (n 14) Chapter 8.

to consider all measures available for publishers to use in tackling piracy. The fact that music and film were the first to suffer the effects of digital piracy does not mean that publishers did not similarly suffer. Thus, the forerunning GR systems which shaped and influenced the UK and US voluntary systems are important for understanding the development of this copyright enforcement mechanism. Furthermore, the engagement of publishers with notice and takedown systems and the blocking injunction schemes as discussed in the following chapter show that publishers were and indeed are concerned with piracy. Thus, for a more complete view of the efforts made to combat piracy both in the UK and abroad, the inclusion of graduated response systems was important to give context to the efforts of all creative content owners. Chapters 3 and 4 are intrinsically linked, as different examples of piracy prevention or rectification measures, and thus Graduated Response, blocking injunctions, and Notice and Takedown all needed to be discussed.

All of the agencies which were consulted in the beginning stages of this project and throughout the course of the research period are on the commercial, rather than the consumer side of publishing. This was a deliberate choice, based on the limited time available for a doctoral research project, the focus of a single perspective and the ability to research in greater depth the perspective of a publisher. This is not to say that the consumer perspective is not important – of course it is, and this would be an area for future research projects. However, in order to present a focused study of the impact of the digital shift on copyright for publishers, it was important to ensure that the subject area of the research was sufficiently narrow to ensure an in-depth examination was possible.

The interaction with these agencies was subject to careful scrutiny as to their influence on the project during the research period. It was important to ensure that the project retained its academic independence and relevance, and was not simply a sycophantic regurgitation of what those agencies felt needed to be said, disguised under the veil of academic independence. Thus, where topics were suggested or mentioned by the agencies consulted, they were included in the research plan, but as a topic for further research. Thorough literature searching for each chapter helped to maintain this objectivity. This can be seen clearly in Chapter 5 where, although the CLA-commissioned reports are included, they are combined with a wealth of other research which had slightly differing conclusions. Also in Chapter 5 is the WIPO-compliant study which gives concrete figures for the economic contribution of the core copyright industries.

The repeated appearance of TDM as a concern for publishing companies also prompted its inclusion in the research plan, but the nature of the research was more than just presenting the reluctance of publishers to embrace change. Rather, a thorough literature search and independent,

objective analysis was conducted. While the inclusion of TDM as a topic was prompted by the concerns of several bodies in the publishing industry, the investigation of the issue was conducted without their input and the assessment of the issues was from a neutral perspective.

The question of bias was of vital importance when considering the methodologies and topics included in the research. Naturally, although the inclusion of topics of concern for publishers was important, it was equally if not more important to ensure that there was no question of bias with regard to the literature considered and conclusions reached. For this reason, where research was funded by a publisher, this is noted specifically in the discussion, and there is only one instance where information comes directly from the publisher itself – in Chapter 6, on the use statistics of TDM. This is clearly flagged, and it is noted in the chapter itself that there is a need for further research into this topic.

The introduction of the thesis outlines the current legal framework of copyright. This is followed by an analysis of the global literature of Anglophonic common-law countries which have called for a reform of copyright in response to the shift to digital, specifically between the years 2010-2014. While the prevailing attitude of this literature (which is largely grey literature[31]) is that copyright is in desperate need of updating, it fails to take into account the ways in which copyright has developed organically during the years of great change which have occurred as a direct result of the digital shift. It is from this approach that the thesis question emerges – it seeks to investigate the ways in which copyright, the copyright industries, and the players in the creative economy have adapted to the digital shift, and how this is comparable to their historical development.

Thus, the thesis continues with a historical investigation of copyright, which traces the development of the right to control copies of an artistic or literary work from its origins in ancient Ireland through the implementation of the first true copyright Act, the Statute of Anne in 1709, all the way up to the present-day tangle of Conventions, Treaties, Directive and Acts which regulate the term, application, protection, and scope of copyright in 2016 and beyond.

From here, the thesis moves on to investigate the legal initiatives which have been established to deal with the shift to digital, and the attendant rise in copyright piracy which accompanied this, in a pair of connected chapters. It considers firstly in Chapter 3 the implementation of graduated

[31] Grey literature refers to literature accessed outside of the usual academic channels – it can include such works as masters and PhD dissertations, government reports, conference proceedings, market research, and working papers. In this context, it is used to refer to mainly government reports and documents produced and supported by industry, whether in submission to a government consultation or independently. Charles P Auger, *Information Sources in Grey Literature* (4th edn, KG Saur 1998).

response (GR) systems, which aim to deter copyright pirates from infringement through a series of escalating penalties. Such systems have been implemented in multiple jurisdictions, starting with France, and have encompassed both legislative and voluntary systems. Chapter 3 discusses their gradual evolution around the world from purely penal systems, such as in France and New Zealand, to those with a focus on a more educational and deterrent framework, such as in the US and the UK, which concentrate on educating consumers and directing them to where they can obtain legitimate content.

The second of the two legal framework investigation chapters, Chapter 4, looks at the parallel notice and takedown systems in Europe and the US, as well as their possible abuses. This is twinned with a discussion of injunctions against Internet Service Providers (ISPs), forcing them to block access to infringing sites. This type of injunction is an alternative to pursuing the sites themselves. Such injunctions in Europe are made possible by a provision of the InfoSoc Directive.[32] The chapter also looks at attempts to introduce similar measures in other territories, specifically Australia and the US.

Chapter 5 conducts an economic investigation of copyright, using firstly the 2003 World Intellectual Property Organization (WIPO) framework for the estimation of the economic contribution of the copyright industries, and then assessing a range of literature which considers the economic position of the copyright and creative industries, and their adaptation to the digital shift. It focuses specifically on the print and publishing industries where possible, as a case study for copyright works.

Chapter 6 is a case study of two of the exceptions implemented on the recommendations of the Hargreaves Review. It studies the private copying exception and its subsequent judicial review, as well as the exception for text and data mining (TDM) for non-commercial research purposes. The chapter then considers the wider call for a TDM exception across Europe, some of the research which has been produced to consider this exception, and the effect of the implementation of the exception in the UK as a template for the EU.

Finally, Chapter 7 looks at some of the more policy-oriented and cooperative initiatives which have arisen in response to the digital shift. It considers both the UK and European governmental attitudes towards copyright and the need for copyright reform, as well as the development of Open Access as an academic and a wider method of distributing literature. The cooperative initiative

[32] InfoSoc Directive (n 13).

between rights holders, police, and advertising agencies known as 'Operation Creative' which uses the approach of following the monetary incentives in order to effectively protect copyright works is also considered.

It is not possible, of course, to deal in a single thesis with all the issues relating to copyright which have gained prominence in the years 2010-2015. Rather, this thesis focuses on a general overview of some of the ways in which the copyright framework has tried to adapt to the shift to digital, through industry initiatives, legislative systems, and cooperative initiatives which engage all stakeholders in the copyright debate. It focuses on the publishing industries where possible, and thus considers issues such as licensing of content and TDM as case studies for specific issues which affect that particular industry. It also looks at high-level initiatives for protecting and enforcing copyright and improving access to all types of copyright work.

Although publication is of course necessary for the dissemination of the written word, whether by digital or physical means, journal, book, article, or online publishing, there is of course also scope to explore the methods and development of publishing from an academic perspective. Situated within the discipline of Information Studies, or Information Science,[33] which considers various methods of information dissemination and retrieval including library and information studies, archives and research management, digital humanities, the study of publishing is a recognised, although small, academic sector. The study of publishing often intersects with other areas of Information Studies, such as through the Society for the History of Authorship, Reading and Publishing,[34] or other journals which cross disciplines, such as the JISC-funded LIRG Journal.[35] Publishing is by its very nature cross-disciplinary, as the publication and dissemination of information is of vital importance to all areas of research, as well as business and trade publishing, through books, newspapers, magazines, and journals. Publishing studies does have some internationally recognised scholarship, for example through the peer-reviewed Publishing Research Quarterly journal, edited by Robert E Baensch, the Journal of Electronic Publishing, which celebrated its 20th anniversary in 2016 and is edited by Maria Bonn of the University of Michigan, or the Journal of Scholarly Publishing from the University of Toronto and the Association of Learned and Professional Society Publishers' Learned Publishing. These journals, and other academic research on the topic of publishing cover issues relating to publishing from

[33] Wolfgang G Stock, Mechtild Stock, *Handbook of Information Science* (De Gruyter 2013).
[34] SHARP, <http://www.sharpweb.org/main/> accessed 15 July 2016.
[35] LIRG Journal, <http://www.lirgjournal.org.uk/lir/ojs/index.php/lir> accessed 24 August 2016.

'challenges resulting from changes in technology and funding'[36] to analysis of 'content development, production, distribution, and marketing of books, magazines, journals, and online information services in relation to the social, political, economic, and technological conditions that shape the publishing process'[37] and it is within this area that this research project and thesis situates itself.

There is little doubt that the development of digital distribution has had a massive impact on the distribution and production of published material. From online-only journals to ebooks, digital subscriptions to newspapers and websites which offer full magazine content, with the digital revolution came a revolution in publishing. It is in the face of this revolution that this thesis considers the question of whether copyright is still relevant in its current form, and is still fit for purpose – that is to say, encouraging innovation, ensuring distribution of information, but also allowing for content creators to support themselves – for publishers in this new digital environment. Answering that question is this thesis's original and distinct contribution to the base of academic knowledge which underpins the study of publishing. It not only offers an unparalleled assessment of copyright enforcement methods used in the early 2010s, it assesses the publishing industry's engagement with those enforcement methods. Further, it creates a measurable, quantifiable figure for comparison of the contribution of the core copyright industries, and specifically the publishing industries, to the UK's economy in 2010-2012. It also analyses the implementation of the UK TDM exception, which is of vital importance not only for the TDM exception itself, but also as a case study of how the industry reacts to the development of new, innovative techniques which were not possible before the digital shift. Taken as a whole, this research project offers an unparalleled assessment of the issues which the digital shift has presented to publishers with regard to their copyright, how they have adapted to said shift, and indeed the innovation which is possible through new perspectives on copyright which would not have been considered possible in the past. The original and distinct contribution of this thesis to the field of information studies, specifically the study of publishing, is clear.

In conclusion, this dissertation takes an open-minded look at copyright, how copyright has adapted to the digital shift, and whether a wholesale revamping of copyright is necessary in order to continue along the innovative and profitable path which has been forged by the creative industries in the past. It does this with the aim of considering whether a declaration that copyright

---

[36] Journal of Scholarly Publishing, <http://muse.jhu.edu/journal/251> accessed 15 July 2016.
[37] Publishing Research Quarterly, <http://www.springer.com/social+sciences/journal/12109> accessed 15 July 2016.

is stifling creativity is founded, or if content industries have simply not yet been given sufficient time to develop. It notes that legacy businesses such as publishers are slower to move than smaller, nimbler startups and innovative new companies, but this does not mean that they are entirely opposed to, or unable to change.

Legal Framework

Naturally, in order to understand how copyright has adapted to the digital shift, it is necessary first to understand how copyright itself works. The first step for this in the UK is to consult the Copyright, Designs and Patents Act, 1988 (CDPA).[38] This Act is the source of much IP law in the UK, and the majority (although not all) of UK copyright law. It came into effect in 1989, and contains almost all of the rules relating to copyright in the UK, including what constitutes an author,[39] what is a copyright work,[40] and the length of the copyright term.[41] The Act, at its time of development and implementation, replaced the Copyright Acts 1956[42] and 1911,[43] making, inter alia, changes to a variety of copyright terms, the point at which copyright comes into existence, and allowing for the ratification of the Paris Act of 1971.[44]

The CDPA has been amended multiple times since its implementation, often in order to give effect to EU Directives. The most relevant of these, mentioned multiple times in the thesis, is the Information Society (InfoSoc) Directive 2001.[45] The InfoSoc Directive was introduced in 2001 to harmonise European copyright law, and in 2015, remained the authoritative European Copyright Directive, despite calls for its replacement.[46] Although the UK was, at the time of the introduction of InfoSoc, one of few countries (along with Ireland) which declined to fully implement a number of optional exceptions to copyright, in accordance with the Gowers[47] and Hargreaves Review[48] recommendations, a suite of copyright exceptions were introduced in 2014.[49] The exceptions

---

[38] CDPA (n 3).
[39] ibid ss 9-11.
[40] ibid ss 3-8.
[41] ibid ss 12-15A.
[42] Copyright Act 1956.
[43] Copyright Act 1911 (1 & 2 Geo 5 c 46).
[44] The Paris Act is the 1971 revision of the Berne Convention for the Protection of Literary and Artistic Works: Berne Convention for the Protection of Literary and Artistic Works (as revised).
[45] InfoSoc Directive (n 13).
[46] See discussion of the Reda Report in Chapter 7.
[47] Andrew Gowers, 'Gowers Review of Intellectual Property in the UK' (2006).
[48] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) (Hargreaves Review).
[49] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372; The Copyright and Rights in Performances (Disability) Regulations 2014, SI 2014/1384; The Copyright (Public Administration) Regulations 2014, SI 2014/1385; The Copyright and Rights in

covered research, private study, private copying, disability, education, parody, and libraries, archives, and museums. Two of these exceptions are discussed in greater detail in Chapter 6.

Before the suite of 2014 exceptions, the Digital Economy Act (DEA) 2010,[50] and the Enterprise and Regulatory Reform (ERR) Act 2013[51] produced other notable amendments to copyright law. In 2013, the ERR Act laid out, inter alia, provisions for the licensing of orphan works,[52] something which had previously been impossible under UK legislation (and under most other legislative regimes), and created a framework for extended collective licensing.[53] It made other minor amendments to the CDPA including the power to reduce the duration of copyright in transitional cases. Prior to that, in 2010, the Digital Economy Act was implemented to create a GR system for the curtailment of online piracy.[54] The changes to the CDPA mentioned here are only some of those made during the research period – many more were also implemented. The CDPA is not, and never has been, a static Act, but rather is subject to regular checks and modifications to ensure that copyright law in the UK is not only modern and flexible, but also appropriate and, of course, in line with the UK's European obligations.

The rights granted to authors – to control the distribution, reproduction, communication to the public, and public performance of their work – are the hub from which the majority of other copyright actions stem – if a rights holder may control who can copy their work, then they are also able to assign this right to others, or attach specific conditions to how, when, and how frequently their work may be copied, adapted, distributed, or performed. The restriction of those actions (known in the CDPA as 'the acts restricted by copyright in a work'[55]) is the intrinsic power of copyright – allowing a rights holder the power to grant or withhold permission to do these acts is what gives rights holders the ability to profit from their work.

Copyright, naturally, operates in different ways for different types of creative works – although copyright applies to both paintings and books, for example, the way in which they rely on their

---

Performances (Quotation and Parody) Regulations 2014, SI 2014/2356; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361.

[50] Digital Economy Act 2010 (DEA).

[51] Enterprise and Regulatory Reform Act 2013 (ERR Act).

[52] The IPO's Orphan Works licensing scheme was established in 2014. See IPO, 'Orphan Works Licensing Scheme: Overview for Applicants' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368417/orphan-applicants.pdf> accessed 21 December 2015; IPO, 'Orphan Works Register' <https://www.orphanworkslicensing.service.gov.uk/view-register> accessed 21 December 2015.

[53] ERR Act (n 27) ss 74-78.

[54] The DEA and other Graduated Response systems around the world are discussed in Chapter 3.

[55] CDPA (n 3) s 16.

underlying copyright would be very different. For the book, the copyright is an intrinsic part of its sale, as the publisher purchases or licenses the copyright from the author for the purposes of distribution. However, for a painting, the copyright comes into question only if considering prints or reproductions, as original sale of a painting would focus on the physical canvas. Interestingly, paintings are also subject to the Artist Resale Right,[56] which entitles the original author to a royalty every time it is resold through an auction house or art market professional, a right which does not exist with book publication – the resale of a book after first sale does not benefit the original author.[57]

For the purposes of this thesis, it is vitally important to consider one structural necessity of copyright: copyright licensing. The granting of copyright over creative works gives creators the right to control the distribution and reproduction of their works. Licensing these rights, then, is what creates the financial value of copyright – and thus a properly operating licensing framework is vital for a fully functional and economically sound creative economy. Licensing of copyright is essential for bringing content online and creating new content which derives from existing creative content – covers of songs, for example, require a licence for the underlying music and lyrics, and printing books or articles require a licence for the copyright in the text. Selling ebooks requires multiple licences – the author allowing the publisher to reproduce their content, the publisher allowing the online interface (eg Amazon or iBooks) to sell the ebook, and the customer licensing the digital content from the online interface. Licensing is a topic which underpins much of the thesis, and is important especially with the advent of digital – where previously the average consumer was a passive recipient of content, in the digital age, they are also secondary producers of content. The proliferation of YouTube vloggers, bloggers, fan artists and other content creators – from uploading videos of your child dancing to a Prince song[58] to publishing a book online, licensing is an essential concern – has meant that content use has changed greatly from even twenty years ago, and with that change in use comes attitude changes, and a need for better licensing frameworks.

Licensing

Licensing was in 2010-2015 an issue of concern in multiple jurisdictions, including in the European Union. There have been movements at both national and international level to simplify and

[56] The Artist's Resale Right Regulations 2006, SI 2006/346, implementing Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32.
[57] This is known in the US as the first sale doctrine, and in Europe as the exhaustion of rights.
[58] *Lenz v Universal Music Corp* 572 F Supp 2d 1150 (ND Cal 2008) [US].

improve the process of obtaining licences and the content which can be licensed. This particular section focuses on Europe, but this is not to say that licensing is not a concern in other jurisdictions. In 2012, for example, US Register for Copyright Maria Pallante[59] published 'The Next Great Copyright Act'[60] in which she acknowledged that 'Congress may need to consider legislating new forms of licensing regimes'.[61] As the title of the paper may suggest, however, this is not the only reform which Pallante advocates. This is further discussed in the literature review.

Having noted that licensing is not an issue isolated to Europe, then we will return the discussion to there. Thus, we will briefly consider the complexities of copyright licensing in the UK and then Ireland, before considering the European-level discussions of licensing.

United Kingdom

Licensing of copyrights, that is to say, sale of rights to reproduce or manipulate works subject to copyright, is an important part of the copyright environment. While there are copyright licences involved in book, magazine, and newspaper publishing, these are generally individually negotiated between authors and printers, or are standard form licences. There is also a large amount of secondary use of copyright materials. This is largely managed by collecting societies, which are also known as collective management organisations (CMOs), copyright collecting agencies, licensing agencies, or copyright collecting societies. CMOs create and sell licences to bodies that wish to exploit these materials – for example schools that wish to reproduce excerpts of a work for the benefit of their students, or authors who wish to reproduce a quote in their novel. CMOs are helpful not only for content owners, but also content users, as they create a link which allows for the purchase of licences which might otherwise be difficult to obtain. Many CMOs offer bulk licences which cover the works of all their members, and then deal with the distribution of licensing fees, simplifying the process for rights holders and users – a single licence fee paid to a CMO is much simpler than individual licensing transactions for each work.

The CMOs coexist and work together on a variety of issues – for many societies, working together is a necessity. In terms of print CMOs, the Copyright Licensing Agency issues licences as an agent for the Publishers Licensing Society, the Authors' Licensing and Collecting Society, and the Design and Artists Copyright Society. Thus, while authors would be a part of ALCS, the publisher would be part of PLS; neither of these organisations, however, offer licences – the CLA issues

[59] Maria Pallante was in 2015 the current US Register for Copyrights, and thus head of the US Copyright Office, a position she held from 2011.
[60] Maria Pallante, 'The Next Great Copyright Act' (2013) 36(3) Columbia Journal of Law & the Arts 315.
[61] ibid.

licences as an agent for them. These three then coexist with NLA Media Access, the Newspaper Licensing Agency, which licenses on behalf of newspapers and magazines. If this seems confusing to the thesis reader, imagine being a small author attempting to find out from whom to license an excerpt! Although not all authors, publishers, or relevant parties are part of a collecting society, a large number are, and thus the societies have not only collective licensing weight, but also cooperation on research, administration, lobbying, and other matters, including submissions to government consultations.[62]

CMOs are subject to a certain degree of regulation. In 2012, the British Copyright Council (BCC)[63] published a set of principles of good practice for societies.[64] The aim of these was to ensure a standard of conduct for collecting societies. Shortly after this, Her Majesty's Government published a set of minimum standards[65] for Collective Management Organisations. These were developed in conjunction with collecting societies from a range of industries. It was in response to these that the name CMO was adopted, as well as codes of practice which dictate the standards they use in their interactions with licensees and members and the standards of internal governance processes. As well as this, they provided licensees and members with information about how these CMOs operate. In January of 2014, a review[66] was launched of twelve copyright collecting societies.[67] The review's aim was to consider the extent to which CMOs were complying with the BCC guidelines and HM Government's Minimum Standards as well as the effectiveness of that

---

[62] See, for example, CLA, ALCS, PLS, DACS, 'Consultation on the UK's Extended Collective Licensing Scheme' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308298/alcplcdac.pdf> accessed 15 October 2015.

[63] The BCC is an independent, self-funded council which provides a forum for discussion of copyright issues in the UK. It acts as a representative council for copyright creators, rights owners, rights managers and performers in submissions and consultations at both national and international levels. British Copyright Council <http://www.britishcopyright.org> accessed 14 December 2015.

[64] British Copyright Council, 'Principles for Collective Management Organisations' Codes of Conduct' (2012) <http://www.britishcopyright.org/files/2614/1312/8143/BCCPGP_Policy_Framework_250512.pdf> accessed 21 December 2015.

[65] IPO, 'Minimum Standards for UK Collecting Societies' (2012) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/hargreaves-minimumstandards.pdf> accessed 21 December 2015.

[66] British Copyright Council, 'Independent Code Review' (2014) <http://www.independentcodereview.org.uk/files/8413/8979/6209/ICR_Consultation_Paper_090114.pdf> accessed 16th January 2014

[67] Authors Licensing & Collecting Society (ALCS), British Equity Collecting Society (BECS), Copyright Licensing Agency (CLA), Design and Artists Collecting Society (DACS), Directors UK, Educational Recording Agency (ERA), Newspaper Licensing Agency (NLA), Publishers Licensing Society (PLS), Phonographic Performance Ltd (PPL), Printed Music Licensing Ltd (PMLL) and PRS for Music.

infrastructure. This oversight and regulation of CMOs continued until 2014, when legislative regulation was introduced.

Thus, in early 2014, the Copyright (Regulation of relevant licensing bodies) Regulations 2014,[68] accompanied by an explanatory memorandum and an Impact Assessment, made their way through the Houses of Parliament. The power to create these regulations was a result of the ERR Act 2013.[69] The aim of the regulations was to create 'Government powers to close any gaps that may emerge in the self-regulatory framework',[70] and the hope was that this would improve the efficiency of collective licensing societies. This legislation was subject to a consultation process[71] and the majority of responses came, unsurprisingly, from the collecting societies themselves. Commentary on the final regulations was offered (rather caustically) by John Esner on the 1709 Blog, who questioned 'whether the new laws will actually change behaviour or help anyone – well, mean anything really.'[72] Although the Regulations came into force in April 2014, there was no mention of them from implementation until the end of 2015, which could mean that they were functioning perfectly, and thus their punitive powers had not been utilised, or that they were in fact, unnecessary, as CMOs were capable of regulating themselves.[73]

While collective licensing was relatively well-developed, and subject to supervisory measures by government, the long tail of high-frequency, low-value uses of content remained difficult to license.[74] These difficulties were highlighted in the Hargreaves review, wherein Professor Hargreaves recommended the establishment of a Digital Copyright Exchange.[75] This challenge was taken on by Richard Hooper and Dr Ros Lynch. They produced a two-part study of the feasibility of a digital copyright exchange (DCE)[76] and established the framework of that DCE,

---

[68] Copyright (Regulation of relevant licensing bodies) Regulations 2014 SI 2014/898.
[69] ERR Act (n 27).
[70] IPO, 'Implementing the Hargreaves Review: Progress to Date' (2014) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/types/hargreaves.htm> accessed 21 December 2015.
[71] IPO, 'Consultation on draft secondary legislation to regulate collecting societies' (2013) <https://www.gov.uk/government/consultations/draft-secondary-legislation-to-regulate-collecting-societies> accessed 13 January 2016.
[72] John Esner, 'Draft secondary legislation to regulate collecting societies laid in Parliament' (*The 1709 Blog,* 6 February 2014) <http://the1709blog.blogspot.co.uk/2014/02/draft-secondary-legislation-to-regulate.html> accessed 21 December 2015.
[73] IPO, 'Secondary legislation for the regulation of collecting societies' (2014) <https://www.gov.uk/government/news/secondary-legislation-for-the-regulation-of-collecting-societies> accessed 13 October 2015.
[74] Hooper (n 10).
[75] Hargreaves Review (n 24) chapter 4, 4.14 'A Digital Copyright Exchange'.
[76] Hooper (n 10); Richard Hooper and Ros Lynch, 'Copyright Works: Streamlining copyright licensing for the digital age' (2012)

known as the Copyright Hub. The Copyright Hub aimed to be an online copyright exchange where consumers and licensees would be able to obtain licences for their low-value transactions such as a song on a wedding video or other single-use licences. The first year of the Hub was characterised by the development and launch of a test website, http://copyrighthub.co.uk.[77] As of late 2015, the database was not yet active, and the site existed as a set of signposts to relevant CMOs.

The long development period of the Copyright Hub demonstrates the difficulty of licensing, especially small licensing transactions. However, the importance of simplifying licensing cannot be overstated – as the Hargreaves Review pointed out, waiting several weeks for a simple permissions request could be the difference between a successful start-up and a failure.[78] Automated licensing systems which simplify and shortened wait times could be the difference between six weeks and six minutes to obtain a permissions request.[79]

The Copyright Hub was not the only digital licensing platform which developed in response to the digital revolution. Although the future existence of a one-stop shop for single or small-use licences is a laudable aim, the difficulty of this cannot be underestimated. A functioning database which can not only identify content and the relevant rights holders for that content, but also allow for the purchase of a range of licence options through the Copyright Hub website would require a huge amount of development, and thus should learn from the example of existing databases. The Hargreaves Review stated that the UK had over 70 licensed digital music services,[80] and rights databases exist in other situations also.

PLSclear,[81] a system developed by the PLS, is one such example. It uses the PLS title database to identify rights holders, and uses an interactive online questionnaire to send licensing requests to those rights holders, simplifying and streamlining the process of licensing published content for re-use. This step toward the simplification of licensing is a vital development, and its scope is only part of that which the Copyright Hub is aiming to achieve.

<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase2.pdf> accessed 21 December 2015.

[77] Date of launch was July 2013.

[78] Hargreaves Review (n 24), 29.

[79] From conversation between author and PLS Deputy Chief Executive and Head of Business Development, Jonathan Griffin, 20 August 2015 11am.

[80] Hargreaves Review (n 24), 29.

[81] PLSclear <http://www.plsclear.com/> accessed 18 December 2015.

Ireland

Licensing was also an issue for other states at the same time. In Ireland, the Copyright Review Committee made a recommendation in 2013 to develop and establish a DCE,[82] similar to the Copyright Hub. Ireland is a country closely analogous to the UK, not only due to its physical proximity and membership of the European Union but also by virtue of the fact that it is a common law jurisdiction and chose not to fully implement the InfoSoc exceptions. For these reasons, it features heavily in this thesis as a comparative jurisdiction against the UK. The recommendation for a DCE was reached after an extensive process of research, including a website, public meetings, written submissions, a Consultation Paper and further written submissions.[83] By early 2016, the idea of a DCE was nothing more than a recommendation – its establishment would hinge on the existence of a copyright council, another recommendation of the report.[84] However, the very fact that the recommendation was made is indicative of the movement towards simplifying licensing. It will be interesting to see if such a DCE is established in one of the UK's closest neighbours and if so, whether interoperability between the two would be a possibility. This shared concern about the difficulty of obtaining single use, small scale licences is symptomatic of the efforts of governments to adapt to the content creation and manipulation era.

Europe

Licensing has also been an issue at a more international level, with the European Commission conducting a Licences for Europe initiative which concluded after two years, in November of 2013, by issuing ten pledges to ease the difficulty of licensing:

> Ten pledges to bring more content online
>
> 1. Further development of cross-border portability of subscription services.
>
> 2. Improved availability of e-books across borders and across devices.
>
> 3. Easier licen[s]ing for music.
>
> 4. Easier access to print and images.

---

[82] Copyright Review Committee, 'Modernising Copyright: The Report of the Copyright Review Committee' (2013), 9: '...establish a Digital Copyright Exchange (to expand and simplify the collective administration of copyrights and licences)...'.
[83] Copyright Review Committee (n 58) 8.
[84] ibid 9.

5. Enabling the identification of your work and rights online.

6. More active reader involvement in the online press.

7. More heritage films online.

8. Freeing up TV footage archives through digitisation.

9. Improving identification and discoverability of audio-visual content online.

10. Easier text and data mining of subscription-based material for non-commercial researchers.[85]

The Licences for Europe initiative is discussed more fully in the literature review.[86] However, it is worth noting at this juncture that the very existence of an initiative dedicated solely to the discussion of licensing is clearly an indication of the generally agreed importance of licensing as an essential part of the copyright structure which underpinned the creative industries in the European Union in 2013. The Licences for Europe initiative was a two-year consultation which focused on a variety of issues for content creators and users, as well as considering the difficulties of digital licensing, and was indicative of the concern for licensing as a vital part of the copyright economy in Europe.

Direction of thesis

The changes wrought by the digital shift upon the copyright landscape are monumental. Where consumers were previously passive recipients of creative content through purchasing books, DVDs, CDs, and other creative content, now there has been a paradigm shift where content is accessible in a series of clicks, both legally and illegally, and consumers become secondary creators as they remix, reuse, adapt, and share content in ways which were utterly unimaginable only a few short decades ago. The ability to obtain copyright works illegitimately, however, has not always been in tandem with the ability to do so legally.[87] Thus, with this change of context for copyright works, it is essential to look at whether or not the copyright framework is suitable to deal with this shifting landscape. Copyright laws which made perfect sense in previous years may no longer be relevant or even feasible in a new digital context – thus it is necessary to conduct an

[85] Licences for Europe, 'Ten pledges to bring more content online' (2013) <http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf> accessed 21 December 2015.
[86] See Chapter 1: Literature Review – European Union.
[87] Hargreaves Review (n 24), 29.

investigation of not only how things have changed, but also how the copyright industries, and especially the publishing industries, have dealt with this change up to 2015. The thesis suggests that adaptation to paradigm shifts takes time, but the copyright industries are still immensely profitable, and the inherent flexibility of copyright means that adaptation and improvement are possible without a wholesale reform of copyright law and the attendant difficulties which follow on from that.

Before plunging headlong into the meat of the research, though, it is vital to consider the relevant literature which has shaped the direction of the research. Thus, in the next chapter, a review of some of the literature calling for reform around the world will be analysed, in order to frame the niche in which this research project resides.

Chapter 1: Literature Review

Introduction

In order to conduct a literature review for this thesis, a grounding in the basics of copyright was first necessary. Thus, for the purposes of this thesis, a preliminary reading of core IP textbooks was conducted. While this established the basics of copyright, it also quickly became clear that it was not possible to use only textbook literature to study the development of copyright in the early 21st century. Indeed, textbook literature became outdated only too quickly. Therefore, this literature review focused on the literature that called for reform in copyright which became visible in the early 2010s, specifically in Anglophonic countries. In this short period, literature appeared from the UK, Ireland, Australia, and the United States advocating for copyright reform – and in some cases extensive copyright reform. For the UK and Ireland, this was compounded by the wider European movement for copyright reform. This review will look at the sources of this call and analyse the gap in the literature within which this thesis will sit. Due to the nature of the literature within which a call for reform can be found, this review focuses very much on 'grey literature' – that is to say, literature which is published for a specific purpose in order to achieve an aim, whether to convince the government that legislative change is needed, or otherwise, or indeed government publications themselves.[1] The issue with grey literature is that it can tend to be biased – because it is commissioned or written for a specific purpose, it lacks the academic neutrality which comes with journal and textbook publications. The lack of academic literature is a problem which has been noted by members of government; Benjamin Mitra-Kahn, an economist with the UK Intellectual Property Office (IPO), discussed this in the wake of the Hargreaves Review.[2] Despite the difficulties of working with grey literature, it is with regard to this call for change, which has come from multiple jurisdictions, that this literature review will position itself, while noting that the nature of grey literature is such that it will naturally fall on one side or other of a debate. Although there are other countries which have also made changes to their copyright legislation – including Canada,[3] India,[4] and Germany[5] – this review elected to focus on the literature which preceded those legislative changes, rather than the legislation itself. Thus, due to language barriers and availability of grey literature, this review will use Ireland, Australia, and the

[1] Charles P Auger, *Information Sources in Grey Literature* (4th edn, KG Saur 1998).
[2] Benjamin H Mitra-Kahn, 'Copyright, Evidence and Lobbynomics: The World After the UK's Hargreaves Review' (2011) 8(2) Review of Economic Research on Copyright Issues 65.
[3] Copyright Modernization Act 2012 (Canada).
[4] Copyright (Amendment) Act 2012 (India).
[5] Achtes Gesetz zur Änderung des Urheberrechtsgesetzes Vom 7 Mai 2013 (Germany).

United States as comparative jurisdictions against the UK, as well as considering the European Union on a larger scale.

The six years from 2010 to 2015 were a time of rapid change with regard to copyright. When considering textbook literature, it is essential to bear in mind that while the broad strokes may still be relevant, changes made to copyright legislation in the time since publication can render those textbooks out of date. Thus, with regard to copyright, many of the core textbooks have been unable to keep up with developments in UK and European copyright law. This is visible almost across the board; the Laddie, Prescott and Vitoria[6] was published after the Hargreaves Review,[7] but before it was accepted by government,[8] and Copinger and Skone Jones, the sixteenth edition of which was published in 2011,[9] and had its second supplement in 2013,[10] does not include the nuances of the development of the Hargreaves exceptions. These two core texts on copyright could not keep up with the rapid developments of European and UK Copyright law. The rapid development of copyright law is problematic for textbook literature, and this holds true also for Bently & Sherman,[11] which too was updated in 2014.[12] While this is equally a clear and dependable text, a staple in the library of the IP scholar, it became outdated even a year after its publication, due to updates to the Hargreaves exceptions and orphan works provisions. The issue of the rapid development of copyright is clear across the board – although Tritton on European Intellectual Property[13] was superseded during the course of the research by its updated edition,[14] it too failed to keep pace.

In Ireland, which features heavily for comparative purposes in this thesis, Eva Nagle's 2012 Intellectual Property Law[15] emphasised the need for a 'smart economy'.[16] It is an authoritative and comprehensive text which outlines not only copyright, but other intellectual property rights in

---

[6] Mary Vitoria and others, *The Laddie, Prescott and Vitoria: The Modern Law of Copyright and Designs* (4th edn, LexisNexis 2011).
[7] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011).
[8] HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (2011).
[9] Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone Jones on Copyright* (16th edn, Sweet and Maxwell 2010).
[10] Nicholas Caddick, Gillian Davies and Gwilym Harbottle, *Copinger and Skone Jones on Copyright* (2nd supp, 16th edn, Sweet and Maxwell 2013).
[11] Lionel Bently and Brad Sherman, *Intellectual Property Law* (3rd edn, OUP 2009).
[12] Lionel Bently and Brad Sherman, *Intellectual Property Law* (4th edn, OUP 2014).
[13] Guy Tritton and others, *Intellectual Property in Europe* (3rd edn, Sweet and Maxwell 2007).
[14] Guy Tritton and others, *Intellectual Property in Europe* (4th edn, Sweet and Maxwell 2014).
[15] Eva Nagle, *Intellectual Property Law* (Round Hall 2012).
[16] ibid, The Hon Justice Clark, Foreword.

Ireland as at date of publication. However, in the three years from publication of the textbook to the end of the research period, it had already been outmoded by the implementation of, inter alia, orphan works provisions,[17] subject to the authority of the European Orphan Works Directive[18] and the introduction of a legislative provision for blocking access to websites which enable copyright infringement.[19] Thus, from this we can observe the rapidly advancing and changing face of copyright legislation in operation.

Textbook literature is an invaluable source of grounding and basic copyright provisions. However, given that this thesis focuses on the response to the digital shift, up-to-date information is essential to keep pace with the rapid changes in copyright, both in industry and through legislation. It is in response to this rapid pace of development that the majority of the literature discussed in the remainder of this review arises. The development of digital and ensuing flood of material available online brought copyright to the forefront of many minds, where previously it would have been a secondary concern. This increase in copyright content meant that copyright rules were analysed and assessed as to whether or not they stand up in a new digital age. The majority of literature relevant to this research project takes the form of reports, consultations, and articles. For each of the United Kingdom, Ireland, Australia, and the United States, there is a work recommending change within that particular territory. The publication of these reports, reviews, and articles has acted as a benchmark: the point from which the development of copyright may be marked.[20]

United Kingdom

In the United Kingdom, the first fifteen years of the 21st century were a hotbed of IP research and development, mainly in the context of copyright. The UK government was active in the field of IPRs, first by creating the Commission on Intellectual Property Rights (IPR Commission) (which disbanded after publishing its report), secondly by commissioning the Gowers Review, and following this up with the Hargreaves Review, then finally continuing to commission and conduct research over the course of the following years.

---

[17] European Union (Certain Permitted Uses of Orphan Works) Regulations 2014 SI 2014/490 (Ireland).
[18] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5 had only been proposed at the time of publication, and thus logically the book cannot discuss the subsequent statutory instrument which implemented the Directive. It does mention that the Directive had been proposed, and puts forward the position of the Copyright Review Committee, that it was insufficiently broad to cover non-digitisable orphan works.
[19] European Union (Copyright and Related Rights) Regulations 2012 SI 2012/59 (Ireland); these Regulations are discussed in Chapter 4.
[20] These countries were selected on the basis of being both common-law countries and English-speaking, making for easiest comparison with the UK copyright regime.

The IPR Commission was established in 2001 to consider the ways in which IPR regimes affect developing countries, and how UK regimes can be developed to allow for this.[21] Its final report, 'Integrating Intellectual Property Rights and Development Policy'[22] was published in September 2002. The chapter considering copyright pointed out how the transition to digital could be a struggle for developing countries, and pointed out the crucial line which all digital copyright regimes must walk – 'getting the right balance between protecting copyright and ensuring adequate access to knowledge and knowledge-based products.'[23] This balance is a question which appears time and again throughout this thesis – copyright plays a dual role of encouragement and access, and balancing the two interests is a vital part of the copyright objective. The report also considered the questions of educational copyright pricing and suggested that developing countries adopt broad educational exceptions to copyright. It recommended that developed countries' publishers review their pricing structures to allow access to knowledge in less-developed countries.[24] Although the report did mention the concerns surrounding the possibility of digital piracy, it was a minor concern, as the whole-scale shift to digital had not yet truly occurred. This report did acknowledge the possibility of difficulties in the shift to digital, but at this early stage, it was not clear exactly how paradigm-changing the advent of digital would truly be. Nonetheless, this report was clear in its emphasis of the essential balance which copyright must find.

The 'Gowers Review of Intellectual Property',[25] commissioned by Gordon Brown as Chancellor of the Exchequer in December 2005, was conducted by Andrew Gowers, former editor of the Financial Times. With a 12-month research period, its publication in December 2006 pre-dated the global economic crisis. Although the ten years from its commission to the end of this doctoral research period have seen distinct developments in the copyright framework, several of its recommendations have stood the test of time. The review concluded that the intellectual property regime in the UK was fundamentally strong, but it made 54 recommendations for changes to the UK IP regime. The recommendations were organised by theme, such as coherence and balance of instruments, and enforcement, and governance operations. The Gowers review also recommended a private copying exception, with no levy for format-shifting works published after the coming

[21] Commission on Intellectual Property Rights, 'Welcome' (*Website of the IP Commission*) <http://www.iprcommission.org/home.html> accessed 14 December 2015.
[22] Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (2002).
[23] ibid 96.
[24] ibid 102.
[25] Andrew Gowers, 'Gowers Review of Intellectual Property' (2006).

into effect of the exception.[26] Given that the Gowers Review did not organise its recommendations by type of intellectual property right, it takes rather longer to whittle out the copyright-related recommendations. Nonetheless, we can see that besides the private copying recommendation, the Gowers Review also suggested, inter alia, an exception for libraries and archives for preservation purposes,[27] an exception for parody, caricature or pastiche,[28] and a provision for orphan works.[29] A further recommendation was that the UK Patent Office change its name to the Intellectual Property Office, which did occur – the Patent Office is now generally known as the Intellectual Property Office or IPO. While the Gowers Review did make recommendations for change, it concluded that, in general terms, the IP regime in the UK was functioning well, and only minor amendments needed to be made in order to maintain a robust yet flexible copyright regime. Several of its recommendations were reiterated in the Hargreaves Review.

Nonetheless, the importance of the Gowers Review, and any governmental response to it, was eclipsed not long after by the review conducted by Professor Hargreaves in 2011, 'Digital Opportunity: A Review of Intellectual Property and Growth'[30] (known as the Hargreaves Review). Commissioned in late 2010, with a research period of six months, the call for evidence was answered by nearly three hundred interested parties, each attempting to answer the central question of the review – 'what, if anything, should we do to change the UK's IP system in the interests of promoting more rapid innovation and economic growth?'[31]

The Review's final report was published in May 2011. The conclusions of the Review were varied, and considered more than just copyright, as was its remit. However, it gave extra consideration to copyright, pointing out that it specifically was falling behind. The overriding opinion of the Review was that the IP framework of the UK was outdated and in need of updating – that it was stifling economic growth and innovation:

---

[26] Gowers (n 25) Recommendation 8. This was also recommended by the Hargreaves Review (n 7). It is discussed more extensively in Chapter 6.
[27] Gowers (n 25) Recommendations 10a and 10b. These were also recommended by the Hargreaves Review (n 7).
[28] Gowers (n 25) Recommendation 12. This was also recommended by the Hargreaves Review (n 7).
[29] Gowers (n 25) Recommendations 13 and 14a. This was recommended by Hargreaves (n 7), as well as being mandated by the EU with its Orphan Works Directive (n 21).
[30] Hargreaves (n 7).
[31] Ian Hargreaves, 'Call for Evidence: Independent Review of Intellectual Property and Growth' (2010) 1 <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e.pdf> accessed 14 December 2015.

> Could it be true that laws designed more than three centuries ago with the express purpose of creating economic incentives for innovation by protecting creators' rights are today obstructing innovation and economic growth? The short answer is: yes. We have found that the UK's intellectual property framework, especially with regard to copyright, is falling behind what is needed.[32]

The Review made ten recommendations for the development of the UK IP regime,[33] organised by type of IP right. For this thesis, recommendations 3, 4, and 5, which concern copyright licensing, orphan works [works for which no rights holder can be found] and copyright limits will be considered.

Recommendation 3 of the review was the suggestion of the establishment of a digital copyright exchange, which would allow consumers to obtain the low-value, high-frequency licences which form the long tail of copyright licensing in the UK.[34] This challenge was taken up by Richard Hooper and Dr Ros Lynch, who produced a two-part consultation, 'Copyright licensing: fit for purpose for the digital age?',[35] beginning the process of establishing the Copyright Hub.[36]

Recommendation 4 suggested that the government take steps to legislate for the licensing of orphan works. This happened in 2013 and 2014, through the ERR Act[37] and the establishment of the orphan works register[38] and orphan works licensing scheme.[39] These schemes allowed for the use of works for which the rights holder could not be found, with a provision for the government to reimburse a rights holder if they were subsequently identified.

Recommendation 5 suggested that the government deliver exceptions to copyright to the fullest extent permitted by EU Directives[40] – in format shifting, parody, non-commercial research, and

---

[32] Hargreaves (n 7) 1.
[33] Hargreaves (n 7) 8-9.
[34] Hargreaves (n 7) 8.
[35] Richard Hooper, 'Rights and Wrongs: Is Copyright Licensing Fit For Purpose in the Digital Age?' (2012) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase1.pdf> accessed 14 December 2015.
[36] The Copyright Hub was discussed in the introduction, and is discussed again in Chapter 7.
[37] Electronic and Regulatory Reform Act 2013.
[38] IPO, 'Orphan Works Register' <https://www.orphanworkslicensing.service.gov.uk/view-register> accessed 21 December 2015.
[39] See Aislinn O'Connell, 'Copyright in Unpublished Works: 2039 and Orphan Works' (2015) 39(121) Library and Information Research 41.
[40] Hargreaves (n 7) 8.

library archiving. It also suggested something new – a text and data mining exception.[41] The Review also suggested that the new exceptions be protected from contractual override.[42]

Other recommendations in the Review suggested that the UK IP regime should be more flexible and adaptable to change, and that enforcement of IPRs be improved[43] – at the time of publication, the DEA[44] was supposed to come into effect the following year, thus the Review suggested careful monitoring of its effectiveness. It also suggested that monitoring of benchmarks should not wait until the implementation of the DEA enforcement regime, but rather should be started immediately – this was a fortuitous recommendation, as it led to five waves of research to consider, even before the DEA regime came to fruition, if indeed it ever does.[45]

The Hargreaves Review in general took a negative view of the state of IPRs in the UK.[46] It was very definite in stating that the intellectual property arena was stifling innovation, profit and creativity.[47] This was a stark contrast to the Gowers Review of only five years earlier, which was generally very positive about IP, even while making recommendations for change. While there is no doubt that there was a shift in terms of the global economy between 2006 and 2011,[48] the complete difference in tone between the two consecutive British Reviews is still noteworthy. It is worth considering also that the tone of the Hargreaves Review was mirrored more closely in other Reviews and Reports than that of the Gowers Review – the idea that copyright was stifling innovation and preventing the creative industries from achieving true growth is one which was reflected across a variety of territories. Although the Hargreaves Review did not call for an entirely new Copyright Act, and thus was not as revolutionary as it might have been,[49] it was unequivocal in its statement that copyright was preventing innovation in the UK, and needed to be reformed. This vehement statement of the unsuitability of copyright was backed up by economic impact

---

[41] The Hargreaves exceptions are discussed in more detail in Chapter 6.
[42] Hargreaves (n 7) 9.
[43] Hargreaves (n 7) 8-9.
[44] Digital Economy Act 2010. This Act laid out the framework for an enforcement regime which was designed to deter consumers from downloading copyright content illegally. It is more fully discussed in Chapter 3.
[45] IPO, 'UK consumers give boost to legal downloading and streaming for TV, films and music' (Press Release, 22 July 2015).
[46] 'It is impossible to avoid the conclusion that there is something deeply and persistently amiss in the way that policy towards IP issues in the UK is determined and/or administered' Hargreaves Review (n 7) 93.
[47] Hargreaves Review (n 7) 10.
[48] Jean Imbs, 'The First Global Recession in Decades' (2010) 58 IMF Economic Review 327.
[49] Simon Crompton, 'Hargreaves Review Lacks Detail and Ambition' (June 2011) Managing Intellectual Property 12.

assessments which extolled the virtues of implementing new exceptions to copyright in order to improve innovation. However, these impact assessments have been criticised for their poor supporting evidence.[50] In fact, a lack of supporting evidence is a criticism which has been levelled at the Hargreaves Review more than once.[51] As well as this, the Review has been subject to criticism for missing the mark, with its recommendations described as being 'likely to cause irreparable damage'.[52] Hargreaves himself responded to the House of Commons committee on this.[53] Further, the weakness and lack of evidence was acknowledged by IPO economist Benjamin Mitra-Kahn, who discussed the effect of 'lobbynomics' on policy-making, and outlined that government departments were very much in need of cooperation from the public with regard to economic research.[54]

In several chapters of this thesis, standards of evidence are referenced. Given the criticisms levelled at the Hargreaves Review and the difficulty of implementing the exceptions recommended by the Review (discussed further in Chapter 7), it is crucial that evidence in support of changes to legislation is solid and verifiable. In referring to standards of evidence, this thesis relies on the IPO's own documentation, setting these out. The IPO's 'Guide to Evidence for Policy: Update 2013'[55] sets out clear guidelines for what constitutes acceptable evidence for the IPO, including clear explanation, verifiability by a third party, and peer reviewing. It lays out common concerns for evidence, and gives solutions to those concerns, eg stating who has funded research and who sponsors them. To say that these standards should be met in policy-making is something of a redundancy, given that it is the IPO itself which set these standards of evidence. Throughout the thesis, good evidence is mentioned as being necessary in order to make changes. Thus, introducing new systems or exceptions, and equally abolishing old systems or exceptions, should be supported by solid evidence which meets the standards laid out by the IPO in its own Evidence Policy Guide.

---

[50] Oxford Economics, 'Consultation on Copyright: Comments on Economic Impacts' (2011). This is discussed more fully in Chapter 5.
[51] Andrew Sharples, 'The Hargreaves Review: Destinations without Routes' (*eIP*, 2011) <http://www.eip.com/uk/updates/article/the_hargreaves_review_destinations_without_routes> accessed 6 October 2015.
[52] House of Commons Culture, Media and Sport Committee, 'Supporting the Creative Economy' (2013) <www.publications.parliament.uk/pa/cm201314/cmselect/cmcumeds/674/674.pdf> accessed 8 October 2015, 25.
[53] Ian Hargreaves, 'MPs Have Missed the Mark in Copyright Reform', (*The Conversation*, 30 September 2013) <https://theconversation.com/mps-have-missed-the-mark-in-attacking-copyright-reform-18703> accessed 18 January 2016.
[54] Mitra-Kahn (n 2).
[55] IPO, 'Guide to Evidence for Policy' (2013) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consult-2011-copyright-evidence.pdf> accessed 01 July 2016.

Where evidence which meets the standard laid out in the IPO's guidelines cannot be provided, then the status quo should be maintained.

As time passed since the publication of the Hargreaves Review and its conclusions, specifically with regard to copyright, were largely implemented, it continued to inform the governmental attitude towards copyright in the following years, and thus remains a seminal piece of literature in the field of copyright, together with those works which have followed on from it. These include Hooper and Lynch's Digital Copyright Exchange Feasibility reports,[56] which were substantially more positive, stating that copyright licensing was a functional system, if only there was a framework to support it – which is taking the form of the Digital Copyright Exchange[57] – and the governmental response to Hargreaves, 'Modernising Copyright',[58] which accepted wholesale the Hargreaves recommendations with regard to copyright. The Hargreaves assessment of copyright then maintained the thread of copyright modernisation and reform in the years following the publication of the Hargreaves Review.

Ireland

Next door to the UK, in October 2013, the Copyright Review Committee in Ireland published its own work titled 'Modernising Copyright'.[59] This report was the product of a two-year consultation process, complete with recommendations to improve the contribution of copyright to innovation in Ireland. The Committee was established in 2011, at the same time as the publication of the Hargreaves Review, by Minister for Jobs, Enterprise and Innovation Richard Bruton, TD.[60] It consisted of Dr Eoin O'Dell, lecturer in law at Trinity College Dublin, taking the position of Chair of the Committee; Professor Steve Hedley of University College Cork; and Patricia McGovern of DFMG Solicitors. The combination of both academic and professional perspectives on copyright gave the Committee a credence which added authority and balance to its report, both through the considerable experience of the panel and the consultation process which sought public opinion at several junctures before the publication of the final report. The Hargreaves Review, by contrast,

---

[56] Richard Hooper and Ros Lynch, 'Copyright Works: Streamlining copyright licensing for the digital age' (2012) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase2.pdf> accessed 21 December 2015;
Hooper (n 35).
[57] The Digital Copyright Exchange is discussed in more detail in Chapter 7.
[58] HM Government, 'Modernising Copyright: A modern, robust and flexible framework' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/response-2011-copyright-final.pdf> accessed 6 October 2015.
[59] Copyright Review Committee, 'Modernising Copyright: The Report of the Copyright Review Committee' (2013).
[60] Teachta Dála, or Member of the Irish Parliament.

was conducted by a journalist, not a legal professional or academic, and had a very short consultation period. The difficulty of obtaining evidence from academics is highlighted in the Lobbynomics paper published by one of the IPO economists also, thus by having two academics on the Committee, there was an attempt to circumvent this difficulty.[61] The report itself was not published until October of 2013, eighteen months after the Hargreaves Review. The extra eighteen months notwithstanding, the report's recommendations were in many ways similar to those of the Hargreaves Review.

When considering similarities between the Hargreaves Review and Modernising Copyright, it is important to bear in mind that while the Hargreaves Review considered the IP spectrum as a whole, Modernising Copyright focused (as the title suggests) solely on copyright, and how it may best be improved to reduce barriers to innovation. Specifically, the remit of the Committee was to consider its Terms of Reference as follows:

> 1. Examine the present national copyright legislation and identify any areas that are perceived to create barriers to innovation.
>
> 2. Identify solutions for removing these barriers and make recommendations as to how these solutions might be implemented through changes to national legislation.
>
> 3. Examine the US style 'fair use' doctrine to see if it would be appropriate in an Irish/EU context.
>
> 4. If it transpires that national copyright legislation requires to be amended but cannot be amended (bearing in mind that Irish copyright legislation is bound by the European Communities Directives on copyright and related rights and other international obligations), make recommendations for changes to the EU Directives that will eliminate the barriers to innovation and optimise the balance between protecting creativity and promoting and facilitating innovation.[62]

The consultation process for the final report was extensive. Beginning with a public meeting in July 2011, the Council also opened up for submissions, through email and via a website.[63] On the

---

[61] Mitra-Kahn (n 2) 67.
[62] Copyright Review Committee (n 58) 8.
[63] Now defunct, it was located at <https://www.djei.ie/science/ipr/copyright_review_2011.htm>.

foot of these and the Terms of Reference, the Council published a consultation paper[64] which discussed the concerns put to them and possible solutions to those concerns. This paper was then used to inform further discussion, submissions, and public meetings before the eventual publication of the final report. Standing at a weighty 180 pages (as against Hargreaves' 130), it is no small, unconsidered, nor hastily thrown together report. Its conclusions were the product of a lengthy process conducted by experts, with the assistance and submissions of interested parties, consumers, content owners, licensing organisations, and heritage institutions. The report made several recommendations which were largely similar to those made by Hargreaves, albeit with a less negative outlook on how functional the current copyright framework was.

The report's recommendations included both specifically legislative and procedural changes, and also more organisational changes. On the organisational front, the report suggested the creation of a Copyright Council, an independent body which would administer the operation of copyright in Ireland, similar to the Press Council,[65] which is government-supported but independently run. This Council would then have responsibility for education and promotion of copyright in Ireland and abroad, as well as the remit to establish alternative dispute resolution services, an Orphan Works Licensing system, and a DCE, similar to that of the UK; the report suggested that the UK DCE could be used as an example for an eventual Irish DCE, including interoperability between the two systems. Further, the report put forward a change of name for the Controller of Patents, Designs and Trade Marks (similar to the suggestion of the Gowers Review which resulted in the renaming of the IPO) to the Controller of Intellectual Property.

On the legislative side, the report recommended, among other things, introducing the full range of exceptions allowed by the 2001 InfoSoc Directive,[66] as well as creating an innovation exception which would allow specifically transformative uses of copyright works. This is something which is available under the US fair use doctrine, which is much more broadly drawn than the narrow European fair dealing exceptions. Together with exceptions for linking[67] and marshalling,[68] the report suggested much which would allow the operation of a digital world to ensure the continuing creativity of the Irish economy. However, the implementation of such exceptions would have to

---

[64] Copyright Review Committee, 'Copyright and Innovation: A Consultation Paper' (2012).
[65] Irish Press Council – Office of the Press Ombudsman <http://www.presscouncil.ie/> accessed 14 December 2015.
[66] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).
[67] Copyright Review Committee, Report (n 58) 52.
[68] ibid 54.

be carefully considered, as the InfoSoc Directive provides an exhaustive list of exceptions, and thus linking, marshalling and innovation exceptions would have to be drawn so as to sit inside of those existing InfoSoc exceptions.[69]

The third point of the Terms of Reference for the Committee was to investigate the feasibility of a US-style fair use exception in an Irish/EU context. This was taken on gamely by the Committee, which recommended in its draft bill that a tightly-drawn fair use exception be included, but only as a last resort, after existing exceptions had already been exhausted. This suggested provision was informed not only by the US fair use system, but also Holland, India, Israel, the Philippines, and Singapore, as well as the terms of the Berne Three-Step Test.[70] In the consultation paper, it proposed a wording for a fair use exception which drew on the US fair use system together with others around the world, including the Dutch system which, naturally, can work within the framework of the EU to which Ireland is also bound, and sought opinions on their draft section.[71] Fair use would, the report then argued, enable Ireland to adapt to cloud computing and 3D printing, regardless of which way they developed, and would send a signal to innovators that Ireland was supportive of both their efforts, and of protecting the rights of copyright holders.[72]

Part of the reason why the Modernising Copyright report was so much longer than the Hargreaves Review was related to the fact that the second half of the report consisted of a draft bill with tightly drawn provisions for enacting all of the recommendations of the report. This draft bill would, it was hoped, then help to speed along the reform of copyright in Ireland in order to promote innovation, simplify licensing, make copyright less confusing, and move Irish copyright into the modern, digital age. Given that the report contained a full bill drafted by the Committee, under the direction of the Minister for Jobs, Enterprise and Innovation, one would have thought that it would then have been a natural follow on that the draft bill be tabled for debate in the Oireachtas.[73] However, almost two years after the publication of the report, and despite the coverage given to it at the time,[74] there was no sign of the wholesale copyright reform which the

---

[69] InfoSoc Directive (n 68), Recital 32.
[70] Copyright Review Committee, Consultation Paper (n 63) 111-123.
[71] ibid 120-121.
[72] Copyright Review Committee, Report (n 58) 93.
[73] The Irish Parliament.
[74] Bruce Baer Arnold, 'Eire' (*Barnold Law,* 29 October 2013) <http://barnoldlaw.blogspot.co.uk/2013/10/eire.html> accessed 15 December 2015; Damien Mulley, 'Link Without Fear – Copyright in Ireland in a Digital Age' (*Damien Mulley,* 29 October 2013) <http://www.mulley.net/2013/10/29/link-without-fear-copyright-in-ireland-in-a-digital-age/> accessed 15 December 2015; Arthur Beesley, 'Expert committee calls for establishment of copyright council' (*The Irish Times,* 29 October 2013) <http://www.irishtimes.com/news/ireland/irish-news/expert-committee-calls-for-

report recommended. It is given only passing mention in the occasional newspaper article,[75] and still listed on the website of the Department of Jobs, Enterprise and Innovation,[76] although with no indication whether or not any further action would be taken to implement the review. Of course, with the European Commission promising copyright reform before the end of 2015, the focus at the time was on a wider area than just simply Ireland.[77]

European Union

The European Union, too, was not silent on the issue of copyright reform. However, there was no single document from which one could take their analysis. Rather, there are the results of several proceedings which have considered copyright reform at a European level.

At its most basic, and most authoritative, of course, the European Union was the source of the Directives which administer copyright across the European Union. From the 2001 InfoSoc Directive[78] to the 2012 Orphan Works Directive,[79] with all the copyright-related Directives which were issued in between, there was much authoritative literature which stemmed from Europe and concerned copyright. However, this literature review will focus specifically on that which considered copyright reform as a priority in the years 2010-2015.

---

establishment-of-copyright-council-1.1576122> accessed 15 December 2015; Peter Flanagan, 'Copyright law to embrace digital age' (*The Irish Independent,* 29 October 2013) <http://www.independent.ie/irish-news/copyright-law-to-embrace-digital-age-29707320.html> accessed 15 December 2015; Conn Ó Muinnecháin, 'Copyright Report Proposes Major Overhaul of Irish Law' (*Technology.ie,* 29 October 2013) <http://technology.ie/copyright-report-proposes-major-overhaul-irish-law/> accessed 15 December 2015; Jeremy Phillips, 'Modernising Copyright: The Irish Plan' (*The 1709 Blog,* 29 October 2013) <http://the1709blog.blogspot.ie/2013/10/modernising-copyright-irish-plan.html> accessed 15 December 2015; Rónán Duffy, 'Proposals on new online copyright laws presented to Government' (*TheJournal,* 29 October 2013) <http://www.thejournal.ie/online-copyright-1150856-Oct2013/> accessed 15 December 2015; Sources taken from Eoin O'Dell, 'Modernising Copyright: The Report of the Copyright Review Committee #CRC13' (*Cearta.ie,* 29 October 2013) <http://www.cearta.ie/2013/10/modernising-copyright-the-report-of-the-copyright-review-committee/> accessed 15 December 2015.

[75] Karlin Lillington, 'Dancing Baby can lead the way on Irish Copyright law' (*The Irish Times,* 17 September 2015) <http://www.irishtimes.com/business/technology/dancing-baby-can-lead-the-way-on-irish-copyright-law-1.2354251> accessed 17 November 2015.

[76] Department of Jobs, Enterprise and Innovation, 'Copyright' (*Department of Jobs, Enterprise and Innovation*) <https://www.djei.ie/en/What-We-Do/Research-Innovation/Intellectual-Property/Copyright/> accessed 24 November 2015.

[77] Eoin O'Dell, 'The present of copyright – where are we now with copyright reform?' (*Cearta.ie,* 23 November 2015) <http://www.cearta.ie/2015/11/the-present-of-copyright-where-are-we-now-with-copyright-reform/> accessed 25 November 2015.

[78] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.

[79] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5.

From 2011 to 2013, the European Commission conducted its Licences for Europe initiative, which aimed to simplify licensing at a European level through the use of ten pledges to ease the difficulty of licensing. These were issued in November of 2013.[80] Licences for Europe was an initiative led by three European Commissioners, with the aim being that it would 'seek to deliver rapid progress in bringing content online through practical industry-led solutions.'[81] Nine of the ten[82] pledges made by Licences for Europe were backed by a statement from the relevant stakeholders, outlining a plan for how they would implement these promises.[83] These pledges were another example of different industries working together to overcome the issues that the digital shift presented, in order to both remain profitable, and also to ensure that consumers and customers could access content in the way which had become expected with the advent of digital life.

Licences for Europe was not the only initiative concerning copyright reform in Europe at the time. In 2014, a Directive was voted on[84] which concerned licensing – or rather, those that administer the licences. MEPs voted 640-18 in favour of adopting the bill, which allowed music providers to buy licences allowing them to offer music across the entire EU.[85] This simplified the case as it previously stood, which was that organisations managing authors' rights had to obtain individual licences on a country-by-country basis.[86] The Directive received some criticism, especially with regard to the lack of distinction between categories of rights holders and the Commission's sectorial approach to cross-border licensing.[87] Nonetheless, it met with wide approval in the

---

[80] Licences for Europe, 'Ten pledges to bring more content online' (2013) <http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf> accessed 21 December 2015. The text of the pledges is also available in the introduction.
[81] Licences for Europe, 'About' (*Licences for Europe*) <http://ec.europa.eu/licences-for-europe-dialogue/en> accessed 21 December 2015.
[82] Promise Eight, Freeing up TV footage archives through digitisation: discussions between public broadcasters and rightholders, has no statement. As yet, the author has not managed to find an explanation for this.
[83] The pledges, the statements, and the organisations which have been party to those statements, are all available at Licences for Europe, 'Final Plenary Meeting' (*Licences for Europe)* <http://ec.europa.eu/licences-for-europe-dialogue/en/content/final-plenary-meeting> accessed 21 December 2015.
[84] See European Parliament, 'Texts adopted, 4 February 2014' (*European Parliament)* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0056&language=EN&ring=A7-2013-0281> accessed 21 December 2015.
[85] Ben Challis, 'The Owl, the CopyKat - and the Tiger: All at (C) in a beautiful EC boat' (*The 1709 Blog,* 6 February 2014) <http://the1709blog.blogspot.co.uk/2014/02/the-owl-copykat-and-tiger.html> accessed 21 December 2015.
[86] Benjamin Fox, 'MEPs back pan-EU music licence deal' (*euobserver,* 5 February 2014) <http://euobserver.com/news/123011> accessed 21 December 2015.
[87] Eleonora Rosati, 'EU Parliament adopts Collective Rights Management Directive' (*The IPKat,* 6 February 2014) <http://ipkitten.blogspot.co.uk/2014/02/eu-parliament-adopts-collective-rights.html> accessed 21 December 2015.

European Parliament, and obtained final sign off from EU governments within a few weeks. The Directive was implemented by February 2014.[88] Although the Directive applied only to musical works, the precedent had been set to allow greater cross-border flexibility with regard to copyright works. The Directive itself was expected to come into force by 2016,[89] but actually did so in 2015, with PRS for Music, STIM, and GEMA[90] coming together to create a Pan-European Music Licensing Hub.[91]

The question of cross-border licensing was also considered in the EU Commission's Public Consultation on the Review of Copyright Rules,[92] specifically in the very first question: Why is it not possible to access many online content services from anywhere in Europe?[93] The consultation was launched in December 2013, with an original closing date of February 2014, but this was extended by a month until March. Before the publication of any official responses to the consultation, an Impact Assessment[94] and Copyright White Paper[95] were leaked, which detailed the possible impact of changes to copyright, as well as the ambitions of the Commission as regards copyright. The Commission released a report detailing the responses to the consultation.[96] However, due to the summer break of Parliament, together with the change of Parliament in 2014, no response was forthcoming, and the comprehensive consultation, which considered such issues as linking, browsing, e-lending, mass digitisation, TDM, term of protection, reselling digital files,

---

[88] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2014] OJ L84/72.
[89] Fox (n 85).
[90] PRS for Music, STIM, and GEMA are British, Swedish, and German CMOs.
[91] Tom Pakinkis, 'PRS, STIM and GEMA launch licensing hub for Europe' (*Music Week,* 20 July 2015) <http://www.musicweek.com/news/read/prs-stim-and-gema-launch-licensing-hub-for-europe/062333> accessed 21 December 2015; Coral Williamson, 'PRS for Music, STIM, GEMA combine for pan-European hub' (*Music Week,* 16 June 2015) <http://www.musicweek.com/news/read/prs-for-music-stim-gema-combine/062067> accessed 21 December 2015.
[92] Commission, 'Public Consultation on the review of the EU copyright rules' (2013) <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm> accessed 13 January 2016.
[93] ibid 7.
[94] Commission, 'Draft Impact Assessment on the modernisation of the EU copyright acquis' (2014) <http://statewatch.org/news/2014/may/eu-draft-impact-assessment-copyright-acquis.pdf> accessed 13 January 2016.
[95] Commission, 'A Copyright Policy for Creativity and Innovation in the European Union' (2014) (Draft) (White Paper) <https://dropbox.com/s/oxcflgrav01tqlb/White%20Paper%20%28internal%20draft%29%20%281%29.PDF> accessed 13 January 2016.
[96] Commission, 'Report on the responses to the Public Consultation on the Review of the EU Copyright Rules' (2014) <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf> accessed 21 December 2015.

and the possibility of establishing a single EU Copyright Title,[97] was abandoned. However, some of the questions were simultaneously considered, such as hyperlinking, on which a decision was issued by the CJEU on February 13 2014,[98] and TDM, which was also the focus of a working group in the Licences for Europe process.[99]

In the months leading up to August 2015, the end of the research period, it became abundantly clear that copyright was a priority for the European Parliament and Commission, as well as the Court of Justice. Copyright was also one of the pillars of the European Digital Single Market Strategy. As this is discussed further in Chapter 7, it will suffice here to state that Europe was, at the same time as the UK and other territories discussed here, focused on copyright as an area ripe for updating and reform, in order to adapt to digital.

Australia

Similar to the Irish copyright reform consultation, a multi-year copyright consultation was conducted by the Australian Law Reform Commission (ALRC). After being given a reference in 2011, the ALRC produced firstly an issues paper in August 2012,[100] followed by a discussion paper[101] in May of 2013, which was open for comment until the end of July of that year, before it presented its final report to the Australian government in November 2013. The report was then published in February of 2014, after it was tabled in the Australian parliament.[102] The ALRC Inquiry was headed by Professor Jill McKeough, who took leave from her position as Dean of Law at the University

---

[97] The Commission did not cease to work on copyright development, publishing a proposal for a Regulation on content portability and a Communication entitled 'towards a modern, more European Copyright framework' in December 2015. Eleonora Rosati, 'BREAKING: EU Commission unveils next steps for copyright reform, including draft content portability regulation' (*The IPKat,* 9 December 2015) <http://ipkitten.blogspot.co.uk/2015/12/breaking-eu-commission-unveils-next.html> accessed 14 December 2015.

[98] *Svensson and others* (Case C-466/12), which stated that linking to an existing work online is not in and of itself an infringement, but making available to a new public (by, for example, working around a paywall) would be infringing. For more on this, see Eleonora Rosati, 'Early thoughts on Svensson: communication/making available, "new" public, altering the scope of exclusive rights' (*The IPKat,* 13 February 2014) <http://ipkitten.blogspot.co.uk/2014/02/early-thoughts-on-svensson.html> accessed 21 December 2015.

[99] Text and Data Mining Working Group (Working Group 4). See Licences for Europe, 'Text and Data Mining Working Group (WG4)' (2013) <http://ec.europa.eu/licences-for-europe-dialogue/en/content/text-and-data-mining-working-group-wg4> accessed 21 December 2015.

[100] Australian Law Reform Commission, 'Copyright and the Digital Economy' (2012) ALRC Issues Paper 42.

[101] Australian Law Reform Commission, 'Copyright and the Digital Economy' (2013) ALRC Discussion Paper 79.

[102] Australian Law Reform Commission, 'Copyright and the Digital Economy: Final Report' (2013) ALRC Report 122 (ALRC Final Report).

of Technology, Sydney, to join the ALRC for the duration of the inquiry.[103] The ALRC Report, similar to the Irish and British offerings, contained a multitude of recommendations for copyright reform, and similarly to the Irish offering, suggested that the Australian government expand the current fair dealing exceptions to copyright into a full fair use provision, which would be fairer, more transparent, more comprehensible and better able to withstand the test of time than the then-current copyright provisions in Australia.[104] It made recommendations with regard to orphan works[105] and specific exceptions to copyright which were very similar to those recommended by the Hargreaves Review,[106] including quotation,[107] private use,[108] TDM,[109] libraries and archives,[110] education,[111] and disability access.[112] However, the report maintained that any and all exceptions should be superseded by a fair use exception, which would eliminate confusion and uncertainty.[113] The report pointed to the largely successful operation of fair use in the United States in the previous 35 years as an example which could be followed in Australia. This is not necessarily the most luminous example, however, as fair use in the United States is often a complex, dense and impenetrable body of decisions which are difficult to extract guidance from – one need only look at the controversy surrounding the late 2013 Google Books decision,[114] an appeal against which was still pending more than ten years after original date of filing, to see how contentious fair use can be.

The Australian Report was a more limited consultation than the Irish and UK reviews discussed above – the ALRC was required to abstain from offering issues on the topics of technical protection measures (TPMs), safe harbours, peer to peer distribution, and print disabled access to copyright works, as these issues were all the subject of separate processes.[115] In essence, the ALRC inquiry was limited to considering the Australian copyright licensing process, exceptions relating to it, and whether these were adequate in the digital age. Finally, it was asked whether new

---

[103] Australian Law Reform Commission, 'Copyright and the digital economy' (*Australian Law Reform Commission,* 30 May 2012) <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy> accessed 14 December 2015.
[104] ALRC Final Report (n 101) 123.
[105] ibid 289.
[106] Hargreaves Review (n 7) 41.
[107] ALRC Final Report (n 101) 209.
[108] ibid 227.
[109] ibid 249.
[110] ibid 267.
[111] ibid 311.
[112] ibid 355.
[113] ibid 160.
[114] *The Authors Guild Inc, and others v Google, Inc* 954 F Supp 2d 282 (SDNY 2013).
[115] ALRC Final Report (n 101) 30.

exceptions should be introduced in order to modernise the Australian copyright licensing regime. As mentioned above, the ultimate conclusion of the ALRC was that the best option it could offer would be a US-style fair use exception, which would remove questions of future-proofing legislation, and make it simpler to adjudicate copyright debates in the future.[116] Failing this, it recommended the introduction of a range of fair dealing exceptions, for:

> (a) research or study;
>
> (b) criticism or review;
>
> (c) parody or satire;
>
> (d) reporting news;
>
> (e) professional advice;
>
> (f) quotation;
>
> (g) non-commercial private use;
>
> (h) incidental or technical use;
>
> (i) library or archive use;
>
> (j) education; and
>
> (k) access for people with disability.[117]

These exceptions were broadly similar to those suggested by the Hargreaves review in the UK and the Irish report Modernising Copyright – they were, according to the words of the ALRC final report, the sorts of uses which would:

- serve an important public purpose;
- stimulate the creation of new works and the use of existing works for new purposes; and

[116] ibid 21.
[117] ALRC Final Report (n 101) Recommendation 6-1.

- not harm rights holders' markets—ensuring exceptions do not undermine the crucial incentive to create and publish copyright material.[118]

Further, the ALRC report also recommended that legislation be amended to specifically remove the possibility of contracting out of these exceptions – again, similarly to the UK provisions.[119] This would be a logical step, as an exception which can be contracted around is one which has little to no effect.

With regard to implementation, although there was some change to copyright in Australia in 2015, it was not the implementation of fair use. Rather, the power to force ISPs to block infringing sites was introduced, and will be discussed in chapter 4. There was no movement to implement the recommendations of the ALRC in 2015, a fact which mirrors the situation in Ireland.[120]

Although the UK, Australia, and Ireland are very different territories in terms of location, the parallel recommendations in their reports informed each other – each subsequent review has referenced that which came before it, and their recommendations could be drawn against each other quite easily. We will now move on to consider the United States copyright reform consultation process, which began slightly later, but nonetheless was similarly framed.

United States

While the Australian and Irish Copyright Review papers were published in 2013, meaning that with a two-year consultation period, they began in 2011, the beginning of the American copyright review was almost concurrent with the conclusion of the Irish and Australian. In 2013, the US Register for Copyrights and head of the Copyright Office, Maria Pallante, called for 'The Next Great Copyright Act',[121] a reworking of the Digital Millennium Copyright Act (DMCA)[122] to encompass the changes which the previous fifteen years had brought to the content creation and distribution arena. She spoke of the need for an efficient way of dealing with orphan works and asked Congress to consider changing the length of the copyright term.[123] She also emphasised the

---

[118] ibid 27.
[119] Hargreaves Review (n 7) 8.
[120] Simon Collinson, 'Explaining Australia's Fair Use Publishing Conundrum' (Publishing Perspectives, 26 February 2014) <http://publishingperspectives.com/2014/02/explaining-australias-fair-use-publishing-conundrum> accessed 12 January 2016.
[121] Maria Pallante, 'The Next Great Copyright Act' (2013) 36(3) Columbia Journal of Law & the Arts 315. Published in journal article form, the work is an extended version of a speech given at the Columbia Law School in March of 2013 – the Twenty-Sixth Horace S Manges Lecture.
[122] Digital Millennium Copyright Act 1998, Pub L 105-304.
[123] Pallante, 'The Next Great Copyright Act' (n 119) 336-7.

need to consider the effect of the growth and development of the internet and legislate appropriately to deal with this.[124] She did not, however, discuss any change to the current fair use provisions – given that the US was held up as a shining example by Australia and Ireland's reform reviews, perhaps this is unsurprising.

This precipitated a two-year music copyright consultation process in the US which consisted of no fewer than twenty copyright hearings before Congress, covering a wide variety of topics relating to copyright – this time including, inter alia, the scope of copyright protection, fair use, the doctrine of first sale and whether there was a digital first sale right, the role of technology and copyright in America, the role of the copyright office, and disability access to copyright materials.[125] The twenty hearings in before Congress were varied and in-depth on a number of copyright modernisation topics. Maria Pallante was the sole witness at both the first (where she delivered a similar set of views to those mentioned above, in a hearing titled 'The Register's Call for Updates to US Copyright Law'[126]) and the last of these ('The Register's Perspective on Copyright Review'[127]), giving it a sense of symmetry. Among other things, the US consultation process resulted in greater calls for independence from the Copyright Office, wanting to move out from under the umbrella of the library of Congress, and the publication in February 2015 of a report on the music licensing system in the US.[128] This report pointed out something which had been mentioned by the Irish and UK publications also – the difficulty of licensing in the digital age. Although the report, and indeed the consultation in general, related specifically to music licensing, its recommendations could easily be extended to other areas of copyright works. The American music industry was at the time the largest in the world, and thus an area of great concern for the US Congress.[129] The two year American consultation process ended in April of 2015, leaving the onus to act on Congress.[130] Although there was no helpful single document produced summarising

---

[124] ibid 327-9.
[125] The full list of hearings, together with links to their proceedings, can be found online: United States Copyright Office, 'Congressional Hearings on the Review of the Copyright Law' (*Copyright.gov*) <http://copyright.gov/laws/hearings/> accessed 9 October 2015.
[126] Maria Pallante, 'The Register's Call for Updates to US Copyright law' (March 20, 2013) <http://copyright.gov/regstat/2013/regstat03202013.html> accessed 9 October 2015.
[127] Maria Pallante, 'The Register's Perspective on Copyright Review' (April 29, 2015) <http://copyright.gov/laws/testimonies/042915-testimony-pallante.pdf> accessed 9 October 2015.
[128] Maria Pallante, 'Copyright and the Music Marketplace: a report of the register of copyrights' (2015) <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> accessed 8 October 2015.
[129] IFPI, 'Recording Industry in Numbers' (2014).
[130] Glenn Peoples, 'Copyright Review Concludes with Final Hearing, Ball Passes to Congress' (*Billboard,* 29 April 2015) <http://www.billboard.com/articles/business/6546372/copyright-review-concludes-with-final-hearing-ball-passes-to-congress> accessed 8 October 2015.

the views and recommendations for change of the entire consultation process, the perspective of the Register for Copyright, as delivered in the final hearing of the system, could be viewed as a summation of the process in general. This final hearing testimony pointed out once more the need for immediate change to the copyright system in the US – 'we're already torturing our music community on music issues'.[131] The February 2015 licensing report stated the need for more efficient licensing processes, while still emphasising the need for music creators to be fairly compensated for their efforts.[132] Building on this, the final hearing documentation stated the need for eight separate actions which could be implemented without the need for foundational research first:

1. overhauling the music licensing provisions of the Copyright Act;
2. codifying a resale royalty act for visual art;
3. creating a tribunal for small copyright claims;
4. enacting felony streaming provisions;
5. updating the outdated exceptions that libraries, archives, and museums use;
6. creating a framework to use orphan works;
7. updating the exceptions for persons who are blind or visually impaired; and,
8. shifting the regulatory presumption in the section 1201 rulemaking[133]

As with the other reports, the issues of simpler licensing, small claims, disability exceptions and heritage institutions loomed large – it seems that there is a consensus between the literature around the world with regard to the need for licensing simplification, especially for low value, high volume transactions, as well as a range of exceptions for heritage institutions and the use of orphan works. Register Pallante's testimony in the final hearing focused on the need for updating provisions which had become outdated, due to the passage of time and the development of new methods of sharing, licensing, and using creative works. It is worth noting also that, after extensive

[131] Pallante, 'The Register's Perspective on Copyright Review' (n 125) 76.
[132] Pallante, 'Copyright and the Music Marketplace' (n 126) 1.
[133] Pallante, 'The Register's Perspective on Copyright Review' (n 125) 4-5.

study, the office recommended that the fair use doctrine and making available right should not be updated or changed, as they were functioning well in their current states. This is unsurprising, given that the American fair use doctrine, as mentioned above, was used as the example from which other territories developed their own suggestions for such a doctrine. The collection of literature which comprised the American copyright review process over the two years from 2013-15 was more fragmented than those already discussed, but nonetheless it, too, stated the urgent need for updating copyright rules in the face of a new, modern, digital age, in order to maintain the operability of copyright, encourage content creators, and improve innovation in its home territory. As of August 2015, any action on implementation had yet to happen.[134] This is not so notable as with the Australian and Irish reports, as the period of time between the conclusion of the review process and research period was much shorter.

Conclusion

The literature around copyright in 2010-2015 was extensive – much of it discussing the need for change. There was a general consensus between several different territories that there was a need to improve licensing procedures, and adapt exceptions to copyright, specifically for research (including text and data mining), disability adaptations, format shifting, and cultural and heritage institutions. Jurisdictions around the world saw fit to legislate,[135] or commission enquiries considering how to legislate, for the changes which the digital shift brought. The author has found, however, that in considering the literature, there was little that considered the positives of the current copyright system. Reports and reviews spoke of the stifling effect of copyright and advocate for immediate reform, pointing out the restrictive effect of copyright on innovation, which is the lifeblood of the digital age.[136] Copyright, the grey literature proclaimed, was what was standing between the next Google and profits which would benefit the entire world.[137]

Thus, through this literature review, it is clear that there is a niche in which we can position this research. It considers the reports and grey literature which viewed copyright as a barrier to innovation and then takes an open-minded look at what can be achieved within the current framework of copyright. It is not a blind acceptance of copyright as perfect – indeed, to deny the

[134] The conclusion of the Trans-Pacific Partnership (TPP), a multilateral trade agreement, will also have implications for copyright trade and enforcement. TPP negotiations were continuing past the cut-off date of this thesis, and thus will be a topic for consideration in further research.
[135] Copyright Modernization Act 2012 (Canada); Copyright (Amendment) Act 2012 (India); Achtes Gesetz zur Änderung des Urheberrechtsgesetzes Vom 7 Mai 2013 (Germany).
[136] Hargreaves Review (n 7) 41.
[137] Hargreaves Review (n 7) 44.

almost universal agreement that exceptions to copyright were needed would be redundant, but it aims for balance in investigating the impact of the digital shift on copyright. Furthermore, it investigates how adaptation is possible within the copyright framework in order to successfully take advantage of the opportunities which digital opened up – both for legacy larger copyright businesses and for those new, innovative start-ups which rely on copyright.

Thus, perhaps the need for reform is not as legislatively pressing as one may assume. In this project, the author will fill a gap in the literature by pointing out the function which copyright performs – Pricewaterhouse Cooper, in 2014, estimated the Australian copyright industries to be worth over Aus$100 billion, and around 7.1% of GDP.[138] The UK in 2013 was ranked first in the world in the Global Intellectual Property Index – both for IP as a whole and for copyright as an individual intellectual property right.[139] It was estimated in 2014 that the creative industries in the UK were worth £8 million per hour (an annual value of £71.4 billion) to the UK economy – 5.2% of GDP.[140] Copyright and copyright industries made a measurable, substantial contribution to the economies of the countries they operated in – in this project the author will quantify what the value of the UK copyright industries was in 2010-2012, how copyright adapted to the digital shift, and how, or whether, the copyright regime of the UK needs to be overhauled in 2016 and beyond to allow this profitability to continue. Furthermore, this thesis will point out the inherent adaptability of copyright to change, considering how it has grown and developed in its three hundred year history, from the first great copyright Act, the Statute of Anne in 1709. This project considers the ways in which copyright enforcement has been attempted, through graduated response, notice and takedown, and website blocking injunctions and how these enforcement measures have developed. It will consider whether there was a need for wholesale copyright reform in 2015, or whether minor changes to future-proof copyright were possible. The specific details of a major copyright reform are deliberately not laid out here, as there are many forms it could take, from a harmonisation of European copyright law to abolishing copyright entirely, running the gamut of changes such as introducing a US-style fair use exception, turning copyright into a remuneration right, and shortening the duration of copyright. It does not class codification of national law or the introduction of limited exceptions to copyright as drastic change or overhaul of copyright. The deliberate non-inclusion of the specific form that major copyright form should or could take is due

[138] Pricewaterhouse Cooper, 'The Economic Contribution of Australia's Copyright Industries 2002 – 2014' (2015) 3.
[139] Taylor Wessing, 'Global Intellectual Property Index 4 Report' (2013).
[140] Department for Culture, Media and Sport, 'Creative Industries worth "8 million an hour to UK economy"' (Press Release, 14 January 2014).

to the difficulty and huge scope of developing such reform. Developing such reform would be the provenance of further research. The aim of this thesis is to consider whether the grey literature published and accepted (and in some cases then ignored)[141] around the world is indeed correct, and there is an urgent, pressing need to reform copyright as soon as possible, or whether it is possible, with cooperation and some small changes, to forge a more functional and modern copyright system which enables innovation through interaction between interested parties, and a little patience as the process of adaptation develops. Specifically, this thesis points out some of the ways in which copyright can be utilised, through cooperative, voluntary, industry-funded or government-backed initiatives to better encourage a vibrant, creative and innovative digital economy which continues to enable consumers to make use of the copyright materials which surround them, but also allow creators to be sufficiently remunerated for their works. As ever, there is a delicate balance to be found between the interests of parties involved in copyright works,[142] but as Charles Clark advocated, 'the answer to the machine is in the machine'[143] – the answer to the quandary of copyright parties can be found within those copyright parties, through their cooperation and interaction, and the use of voluntary initiatives combined with some legislative reform.

[141] See the section entitled 'Ireland' in this chapter.
[142] Commission on Intellectual Property Rights (n 22) 18.
[143] Charles Clark, *"The Answer to the Machine is in the Machine": And Other Collected Writings* (Institutt for Rettsinformatikk 2005).

Chapter 2: A historical investigation of copyright

Introduction

Copyright claims its legislative origins in early eighteenth century Britain, some three hundred years ago, with the implementation of the Statute of Anne.[1] However, no idea is formed in a vacuum. To claim that the Statue of Anne was the beginnings of copyright is to deny the development which led to the legislative formalisation of copyright and its subsequent development. Thus, this chapter will trace the origins of copyright from its beginnings through to the Statute of Anne and then to those three hundred years leading to the modern day, from the Irish battle of Cúl Dreimhe through the printing monopoly held by the Stationers' Company in the late 1600s, the first legislative copyright initiative in the Statute of Anne in 1710, the implementation of the Berne Convention in the late 19th century, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) and World Intellectual Property Organization (WIPO) Copyright Treaty of the 20th and 21st centuries, to the modern bundle of rights which are encompassed under the copyright umbrella today. It will consider the development of copyright, and the points at which different types of creative works were included in the definition of copyright. It will also consider the historically different attitudes held towards copyright by different territories, specifically the differences between European and United Stated copyright, and the greater focus in Europe on the moral rights of authors.

Pre-Statutory Copyright

The first dispute over the right to copy concerned, fittingly, a book – a theme which would continue as copyright law, even when legislatively enacted in the UK, applied firstly only to books. The first recorded case law regarding a copy of a book was a dispute between St Finnian and St Columba (or Colum Cille, or Colmcille), in the south-west of Ireland. In the late sixth century (dated variously from 550-600 AD), according to tradition, and the Royal Irish Academy,[2] St Columba copied the Cathach/The Psalter of St Columba from a Psalter belonging to St Finnian.[3] There remains some debate about whether the original text (also suggested to be a copy of the

---

[1] Copyright Act 1709 (8 Ann c 21 or 8 Ann c 19) (Statute of Anne).
[2] Royal Irish Academy, 'The Cathach/The Psalter of St Columba' (*Royal Irish Academy)* <https://www.ria.ie/library/catalogues/special-collections/medieval-and-early-modern-manuscripts/cathach-psalter-st> accessed 21 December 2015.
[3] Ruth Suehle, 'The Story of St Columba: A modern copyright battle in sixth century Ireland' (*OpenSource.com,* 9 June 2011) <http://opensource.com/law/11/6/story-st-columba-modern-copyright-battle-sixth-century-ireland> accessed 21 December 2015.

Vulgate, and thus a valuable text indeed, it being the official Latin translation of the Church) was loaned to St Columba for the purposes of copying, or merely for reading.[4] A dispute subsequently arose between Sts Columba and Finnian as to who the rightful owner of the copied Psalter was. St Columba argued that the copy, made by the sweat of his brow, belonged to him, where St Finnian argued that, as the rightful owner of the original, he should also own the copy. Interestingly, neither was the original author of the text (it being a biblical translation), meaning that issues of authorship did not arise in this particular scenario, only the right over the copy. This parallels nicely with to modern rights scenarios, where the rights holder is often not the author. The Saints took the matter to the High King Diarmait mac Cerbaill for arbitration, who pronounced the judgement 'To every cow belongs her calf, therefore to every book belongs its copy'.[5] St Columba did not agree with this pronouncement, and instigated a rebellion (The battle of Cúl Dreimhne), resulting in some 3,000 deaths – or so the legend says.[6] Modern historical scholarship casts doubt on the authorship of the Cathach, although it has not been proven,[7] and the Cathach is finishing its adventurous life residing in the Royal Irish Academy.[8] Nonetheless, it is interesting to note that the issue of ownership of copies was debated long before the proliferation of copying mechanisms, both in medieval times (with the printing press) and modern (with digital copying).[9] While the pronouncement of ownership of the Cathach (regardless of whether or not St Columba abided by the decision) did not specifically use the term 'copyright', it could be viewed as the first case on the right to copy.

Copyright, of course, did not come into being in a vacuum – the idea of copyright was pre-dated by the idea of the moral rights of authors, the property right over an individual copy of a text, the right of a benefactor who paid for a work to be created, and the right of the government to control what was being published, both censoring and regulating trade. The germination of some of these ideas can be traced back as far as Ancient Greek, Ancient Roman and Ancient Jewish civilisations.[10] However, while these rights were recognised in Ancient civilisations, there was no

---

[4] Craig W Dallon, 'The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest' (2004) 44 Santa Clara Law Review 365, 376.
[5] Jeremy Phillips, 'St Columba the Copyright Infringer' (1985) 12 EIPR 350.
[6] Ray Corrigan, 'Colmcille and the Battle of the Book: Technology, Law and Access to Knowledge in 6th Century Ireland' (GikII 2 Workshop on the intersections between law, technology and popular culture, University College London, 19 September 2007) <http://oro.open.ac.uk/10332/> accessed 15 January 2016, 8.
[7] Brian Lacey, 'Constructing Colum Cille' (2004) 21(3) Irish Arts Review 120, 123.
[8] Royal Irish Academy (n 2).
[9] Corrigan (n 6).
[10] Edward W Ploman and L Clark Hamilton, *Copyright: Intellectual Property in the Information Age* (Routledge & Kegan Paul 1980); Ronald V Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property* (Westview Press 1996).

need for a right over copying, as the reproduction of texts was a long and laborious process, and required a slave or bookseller who was literate, and thus expensive to maintain. There was no financial incentive to copying texts, and thus no need for a right to protect the rights of an author of a text.

In the fifteenth century, the invention of the printing press and the refinement of moveable type by Johannes Gutenberg[11] meant that copying texts was no longer the time-consuming process previously carried out by scribes. Furthermore, it was not as prone to errors. This also meant that there were no longer the same restrictions on the free movement and reproduction of radical ideas which were previously imposed by the time, money, and skill required for scribes. The price of books fell by two-thirds between 1450 and 1500,[12] with the technology spreading across Europe also.[13] The simplicity and relative abundance of new printing technologies led to attempts by the Church to control and regulate the output of printers, partly leading to what would become copyright.[14] In 1501, a papal bull was issued by Pope Alexander VI, prohibiting the unlicensed publishing of books.[15] Almost sixty years later, in 1559, a first list of banned books, the Index Librorum Prohibitorium,[16] was published in the Index Expurgatorius.[17] Such an index actually lasted through twenty printed editions, with the final edition being published in 1948, almost four hundred years after the first. It was formally abolished by Pope Paul VI in June 1966.[18] The aim of the list was to prevent the dissemination of immoral and heretical books, and thus protect the faith and morals of the devout.

The rapid dissemination of works other than those expressly permitted by the government – ie other than Bibles or government information – led to the need to establish control over printers across Europe. Governments required printers to have a specific licence to produce and trade books. Such licences allowed printers to produce specific works for a specified length of time, and

---

[11] Fran Rees, *Johannes Gutenberg: Inventor of the Printing Press* (Compass Point Books 2005).
[12] Jeremiah E Dittmar, 'Information Technology and Economic Change: The Invention of the Printing Press' (2011) 126(3) The Quarterly Journal of Economics 1133.
[13] ibid 1134.
[14] Hector L MacQueen, Charlotte Waelde, and Graeme T Laurie, *Contemporary Intellectual Property: Law and Policy* (OUP 2007) 34.
[15] Gigliona Fragnito, *Church, censorship and culture in early modern Italy* (Adrian Belton tr, CUP 2001) 195.
[16] ––, *Index Librorum Prohibitorum*, 1559.
[17] Paul F Grendler, 'Printing and censorship' in Charles B Schmitt (ed), *The Cambridge History of Renaissance Philosophy* (CUP 1988) 45-46.
[18] Hubert Jedin (ed) *History of the Church: The Church in the Modern Age* (Volume 10, Crossroad Publishing 1981) 186; Max Lenard, 'On the Origin, Development and Demise of the Index Librorum Prohibitorum' (2006) 3(4) Journal of Access Services 59.

to prevent other printers from producing the same work.[19] The licences were limited to the territory in which they were granted, but they also allowed the prevention of foreign imports of the same book. While this certainly sounds similar to modern copyright in certain respects, mirroring almost perfectly the reproduction and distribution rights of modern copyright, an important difference to note is that these rights belonged to the publisher, and not the author of a work.

In England, a monopoly on printing was first granted to Richard Pynson, the King's Printer in 1518.[20] This could conceivably be called the forerunner of English copyright. This monopoly allowed the King's Printer the privilege of controlling all printing in the country, and was similar to those granted on other articles of common use.[21] These monopolies continued to be popular into and throughout the reign of Queen Elizabeth I (1558-1603).[22] Copyright monopolies made their first appearances in other European countries within roughly the same period, with the first being granted in the Republic of Venice (1486).[23]

The control of printing was delegated from the King's Printer to the Privy Council, then working through the Star Chamber, and then further to the City of London livery company, the Stationers' Company, which was granted its Royal Charter in 1556.[24] The Charter granted the Company the right to license publication of books, entering them into the Stationers' Company register. It also allowed the Company to search for and seize illicit copies of books, and prevent the publication of any unlicensed book.[25] In order to print, one had to be a member of the Stationers' Company. Given that the Company was a craft guild and thus had the powers of any other guild regarding discipline, this meant that the activity of members of the Company was monitored, and disciplinary procedures were relatively efficient.[26]

---

[19] MacQueen, Waelde and Laurie (n 7).
[20] Robert C Hauhart, 'The Origin and Development of the British and American Patent and Copyright Laws' (1983) 5 Whittier L Rev 539.
[21] ibid 541.
[22] Stanley T Bindoff, *Tudor England* (Penguin Books 1950) 228.
[23] Elizabeth Armstrong, *Before Copyright: the French book-privilege system 1498–1526* (CUP 1990) 3.
[24] Hauhart (n 20) 546.
[25] The Stationers Company, 'Our History: The Stationers Company Register (1556-1695)' (*The Stationers Company Website*) <https://stationers.org/the-hall-heritage/library-archives/24-the-hall-heritage.html> accessed 17 November 2015.
[26] Hauhart (n 20) 546.

In the late 17th Century, the control of the Stationers' Company over printing in the UK was confirmed by the Licensing of the Press Act 1662.[27] This Act prohibited the setting up of printing presses without notice to the Stationers Company. It granted a king's messenger the power to enter and search premises for unlicensed printing and presses, a power previously only given to Wardens of the Stationers. The penalties were severe, including fines and imprisonment. The Act's original term was only two years, but was subject to several renewals, as far as a seven-year renewal in 1685 (leading up 1692). When it went before Parliament for renewal in 1695, it was refused.[28]

It is important to note that these legislative and monopoly rights were not the same as modern copyright, but were rather the forerunners of copyright. The rights were vested in the publisher, not the author, and they were not automatic, having to be registered with the Stationers Company. They were also not universally accepted, being criticised, for example, by John Milton in 'Areopagitica; A speech of Mr John Milton for the Liberty of Unlicenc'd Printing, to the Parlament of England', in 1644,[29] a speech still relevant today in its defence of freedom of the press.

In the time immediately following the lapsing of the Licensing of the Press Act, multiple suggestions were made to Parliament to instate similar provisions. Meanwhile, a flourishing press industry started to bloom, with the beginnings of newspapers in London after the demise of the government-published London Gazette, and the two newly-established political parties – the Whigs and the Tories – began to realise the advantages of having a propaganda machine available to influence the electorate.[30]

The Stationers continued to lobby for a new licensing Act but were not successful. When their cries were joined by the voices of authors, including Daniel Defoe,[31] the Stationers changed their approach. They lobbied for a return to licensing again, but this time with a focus on protecting

---

[27] – –, 'Charles II, 1662: An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses', in John Raithby (ed), *Statutes of the Realm: Volume 5, 1628-80* <http://www.british-history.ac.uk/statutes-realm/vol5/pp428-435> accessed 17 November 2015, 428-435.
[28] – –, 'Reasons for objecting to the renewal of the Licensing Act, London' (1695), in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (www.copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1695> accessed 17 November 2015.
[29] John Milton, 'Areopagitica; A speech of Mr John Milton for the Liberty of Unlicenc'd Printing, to the Parlament of England' (1644).
[30] Kevin Williams, *Read All About It!: A History of the British Newspaper* (Routledge 2009).
[31] Daniel Defoe, 'Defoe's Essay on the Press, London (1704)', in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (www.copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1704> accessed 17 November 2015.

authors and guaranteeing them an income, an approach demonstrated by Stationer John How's 1706 pamphlet 'Reasons humbly Offer'd for a Bill for the Encouragement of Learning and the Improvement of Printing.'[32] The Company used this approach and the support of authors to present two bills to Parliament aiming to introduce copyright, in 1707[33] and 1709.[34] They both failed, but it was less than a year before the House of Commons formed a drafting committee for a bill on copyright.[35] This would eventually become the Statute of Anne.

The Statute of Anne 1709

In April 1710, the first copyright statute received royal assent. 'An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned',[36] known as the Statute of Anne for the queen on the throne at the time, was the embodiment of the beginning of modern copyright.

The implementation of the Statute of Anne marked the first time that the copyright of a work was vested in the author, rather than the publisher. Although at the time this was a cynical move made by the Stationers in order to maintain control of the printing and publishing industries, knowing that (at the time) there was little an author could do with such rights other than to sign them over to a publisher, its effects were much farther-reaching than could have been anticipated.[37]

In order to obtain a copyright in one's work, the Statute of Anne required that books first be registered with the Stationers' Company and secondly that copies (nine in total) be deposited with the Company, the royal library and various universities.[38] Once these conditions were fulfilled, an author was granted a fourteen-year copyright,[39] with an extension of another fourteen years if they survived the original term,[40] after which the work would fall into the public domain and be freely available for use by anyone, without the need for a licence. For works published before April 10

---

[32] See Ronan Deazley, 'Commentary on the Statute of Anne 1710' (2008) in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org).
[33] ––, 'Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, London' (1706) Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1706> accessed 17 November 2015.
[34] ––, 'Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, London' (1706) Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1709> accessed 17 November 2015.
[35] Mark Rose, *Authors and owners: the invention of copyright* (Harvard University Press 1993) 42.
[36] Statute of Anne (n 1).
[37] Henry C Mitchell, *The Intellectual Commons: Towards an Ecology of Intellectual Property* (Lexington Books 2005) 35.
[38] Statute of Anne (n 1), s V.
[39] Statute of Anne (n 1), s II.
[40] Statute of Anne (n 1), s XI.

1710, the copyright term was 21 years, starting on that date.[41] During the copyright term, only the author of a book, and their nominated agents, would be permitted to reproduce that book. The Statute of Anne, as the earliest incarnation of statutory copyright, only applied to books.[42] Copyright protection for other works would come later, with engravings in 1734,[43] and plays[44] in the 19th century.

The Battle of the Booksellers

When the copyright term granted by the Statute of Anne began to expire, the Stationers needed to find another way to maintain the status quo. They did this by first lobbying for new legislation to extend the length of the copyright term.[45] This failed, although modern scholars now know that the copyright term currently is far longer than the writers of the original Statute of Anne could probably ever have envisaged. When lobbying Parliament failed, they turned to a second avenue – the courts. Over a period of thirty years known as the Battle of the Booksellers,[46] a series of court cases and attempted injunctions put forth the idea that copyright was a perpetual common law right, meaning that even after the expiration of statutory protection of copyright, copyright would still exist in a work.

The first case that considered the question of perpetual common law copyright was *Tonson v Collins* in 1762.[47] It concerned the reprinting of The Spectator, a daily publication by Joseph Addison and Richard Steele. The case for the plaintiff contained an extensive history of pre-legislative copyright, covering everything discussed above, and was considerably stronger than the defence, with Blackstone stating '[p]roperty may with equal reason be acquired by mental, as by bodily labour'.[48] The outlook looked good. However, when referred to the twelve judges of the common law courts, it emerged that the case was a collusive one, set up by Tonson in order to

---

[41] Statute of Anne (n 1), s II.
[42] This is visible in the long title (n 1), which specifically mentioned 'Printed Books' and not any other type of creative material.
[43] Engraving Copyright Act 1734 (8 Geo 2 c 13).
[44] Copyright Act 1842 (5 & 6 Vict c 45).
[45] – –, 'An Act for the Encouragement of Learning (Draft)' (1737) Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1737b> accessed 15 January 2016.
[46] L Ray Patterson, *Copyright in Historical Perspective* (Vanderbilt University Press 1968), ch 8.
[47] *Tonson v Collins* (1762) 1 Black W 321.
[48] Ronan Deazley, 'Commentary on *Tonson v Collins* (1762)' (2008), in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org).

obtain a favourable judgement. Fearing the consequences of giving a judgement in a collusive action, the judges refused to continue with the case.[49]

The case that succeeded in obtaining a judgement on this matter, in 1769, was *Millar v Taylor*.[50] It concerned the rights to the poem The Seasons, by James Thomson, but the case was between a bookseller, Andrew Millar, and Robert Taylor. Millar had purchased the rights to Thomson's poem, but after the expiration of the statutory copyright term, Taylor published a collection including the poem. Millar took the case to the Court of the King's Bench, where Lord Mansfield led a majority of 3-1 in finding that there was a common law right of copyright, which was not extinguished by the Statute of Anne, and thus there was no time after which a work would pass into the public domain.[51] This essentially abolished the idea of the public domain, as even the expiration of statutory copyright would leave the rights holder with a common law copyright. Due to the death of Millar shortly after the judgement, it was never appealed. This decision represented a major victory for booksellers, as it granted them unlimited rights to the works for which they had purchased the rights.

The decision in *Millar v Taylor* was considered by the Scottish courts in *Hinton v Donaldson*,[52] a case brought by John Hinton and Alexander McKonochie against Alexander Donaldson, John Wood, and James Meuros. It stated that the three defendants had printed, published, and sold Reverend Thomas Stackhouse's History of the Holy Bible, the rights to which had (through sale, death, and remarriage) come to be held by Hinton. Hinton argued that he held a common-law right to publish the book, irrespective of any 'any municipal law or custom of Scotland'.[53] Donaldson, on the other hand, maintained that there was no such right. He also pointed out that such a right had never been sought in Scottish courts, as it did not exist: '... works are silent upon the subject, but the reason is plain, because the notion of literary property was not then conceived in Scotland.'[54]

---

[49] ibid.
[50] *Millar v Taylor* (1769) 4 Burr 2303, 98 ER 201.
[51] Catherine Seville, 'The Statute of Anne: Rhetoric and Reception in the Nineteenth Century' (2010) 47(4) Houston Law Review 819, 822.
[52] *Hinton v Donaldson* (1773) SCS 1 July 1773.
[53] – –, 'Information for Mess John Hinton of London, Bookseller, and Alexander Mackonochie, Writer in Edinburgh, his Attorney, Pursuers; against Mess Alexander Donaldson and John Wood, Booksellers in Edinburgh, and James Meurose, Bookseller in Kilmarnock, Defenders (January 2 1773)' in S Parks (ed) *The Literary Property Debate: Six Tracts, 1764-1774* (Garland 1975).
[54] ibid.

The judgement given by the court of thirteen judges was in Donaldson's favour (by a majority of eleven), decrying the English law as foreign, and thus only persuasive, not binding, and deciding en masse that the common law right did not exist.[55]

Thus, England stood alone as a country granting a perpetual right to maintain a monopoly over the printing and distribution of a work. The fact of a United Kingdom which was capable of legal plurality, combined with the ease of reprinting and export from Scottish booksellers meant that the fundamentally different ideas of copyright in the North and South of the land were bound to butt heads, and another case would have to tackle the fundamentally different ideals before too long.

Such a case did not take long to arrive – three bills were issued against Donaldson, and the third would give rise to a conclusion to the thirty-year saga of the Battle of the Booksellers, in the case of *Donaldson v Beckett*.[56] The Donaldson in this case referred to both the aforementioned Alexander and also his brother John. In an appropriate example of events coming full circle, the work concerned was the same as in *Millar v Taylor*,[57] Thomson's The Seasons. An injunction was granted by the Chancery Court, following the precedent set by *Millar*, which was subsequently appealed to the House of Lords, in February 1774. As was the custom, the opinion of the twelve common law judges was sought, with five questions being put to them, concerning the existence of a common law right, and whether the Statute of Anne took away such a right, if it did exist. The majority of the judges agreed that the common law right did exist, although to varying degrees. This, according to Professor Ronan Deazley of Queen's University Belfast, has been misinterpreted as being more emphatically in favour of common law copyright than in actuality, the conventional belief being that it was a ten to one majority in favour of a common law copyright (Lord Mansfield abstaining, as his opinion had not changed since *Millar*), where the actual majority was seven to four in favour of a common law copyright.[58]

Regardless of the opinions or the size of the majority opinion of the judges, what mattered in this case was the decision of the Lords, which was not bound to follow the opinion of the judges. Although this was generally the practice at the time, this was one case where the Lords did the

---

[55] Ronan Deazley, 'Commentary on *Hinton v Donaldson* (1773)' (2008), in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org).
[56] *Donaldson v Beckett* (1774) Hansard, 1st ser, 17 (1774) 14 George III: 953-1003.
[57] *Millar v Taylor* (n 50).
[58] Ronan Deazley, 'Commentary on *Donaldson v Becket* (1774)' (2008) in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org).

exact opposite, and reversed the earlier injunction without costs.[59] Five Lords spoke on the day of their vote, one (Lord Lyttelton[60]) in favour of the right and four (the Bishop of Carlisle[61] and Lords Effingham,[62] Apsley[63] and Camden[64]) against it. Despite extensive discussion, the only question actually put before the Lords was whether to overturn the injunction granted against Donaldson,[65] but in finding for the defendant, they effectively agreed that the Statute of Anne was the only source of a copyright at English law. Whether the Statute created a new right or superseded the previous common law right, however, was not directly answered by the vote. While Lord Apsley's speech in the House could be considered a declaration of the law at the time, which denied entirely the existence of any common law right, the question of whether the Statute of Anne created a new right, or abrogated a previously existing common law right remains a topic for discussion, as it has not been explicitly answered.

There were some perpetual copyrights at UK law, granted by the Copyright Act 1775 (also known as the Universities Act 1775),[66] although they have been repealed by the Copyright, Designs and Patents Act 1988. Those perpetual copyrights were bestowed on 'the Two Universities in England, the Four Universities in Scotland, and the several colleges of Eton, Westminster, and Winchester to hold in Perpetuity their Copy Right in Books given to or bequeathed to the said Universities and Colleges', and were maintained in legislation until the CDPA. The relevant section of the CDPA[67] allowed for the continued existence of the copyright until fifty years after the date of implementation of the Act, meaning that those rights expire in 2039, at which point there will be no longer be any perpetual copyright in the UK. The CDPA[68] also granted special rights to Great Ormond Street Hospital (GOSH) in respect of the work Peter Pan, or The Boy Who Wouldn't Grow Up, by JM Barrie,[69] but this is a right to royalties in perpetuity, meaning that the hospital may collect royalties on any performance, publication, or adaption of the play. It is not a true

[59] *Donaldson v Beckett* (n 56) 14 George III 1003.
[60] ibid 1002.
[61] ibid 1003.
[62] ibid 1003.
[63] ibid 1001.
[64] ibid 992.
[65] ibid 1003.
[66] Copyright Act 1775 (15 Geo 3 c 53).
[67] Copyright Designs and Patents Act 1988 (CDPA) sch 1 13.
[68] ibid s 301.
[69] JM Barrie, *Peter Pan; or The Boy Who Wouldn't Grow Up* (Hodder & Stoughton 1911).

perpetual copyright grant – it does not allow GOSH to retain creative control over the work, which entered the public domain in 2008, 70 years after the death of Barrie.[70]

After the conclusion of the Battle of the Booksellers, copyright law in the UK continued to be refined and improved, with a series of Acts being implemented, known as the Copyright Acts 1734 to 1888.[71] These fourteen Acts amended, added to, and even repealed the pre-existing copyright law, with notable additions being the extension of copyright to creative works other than books, (through the Prints Copyright Act 1777, the Sculpture Copyright Act 1814, The Dramatic Copyright Act 1833) and the extension of the copyright term to life of the author plus seven years, or forty-two years, whichever was longer (through the Copyright Act 1842). The next notable development of UK copyright law was the Berne Convention for the Protection of Literary Property. Before discussing that, we will consider how copyright developed in other territories in the 15th to 19th centuries.

Global Copyright Development

It would be short-sighted to consider only the development of copyright in the UK without also looking at how it developed in other territories at the same time. For the purposes of comparison, we will consider two other territories. In order to see how copyright developed in other parts of the world, this chapter will consider firstly a state which exemplifies the Continental European ideal of the right of the author, as opposed to the Anglo-American copyright ideal. Secondly, it will consider the other side of the Anglo-American coin, in examining the history and the development of copyright in the US. The exploration of the history of these two regimes will allow for a greater understanding of the way in which they are similar to and distinct from the UK copyright regime.

France

Outside of the UK, copyright was developing in other territories. Although the development of printing meant that the rights over printed works were a concern for most developed countries,

---

[70] Catherine Seville, 'Peter Pan's Rights: "To Die Will Be An Awfully Big Adventure"' (2003) 51(1) Journal of the Copyright Society of the USA 1.

[71] By order of the Short Titles Act 1896 (59 & 60 Vict c 14), the Copyright Acts 1734 was the Collective Title of the following fourteen Acts: The Engraving Copyright Act 1734 (8 Geo 2 c 13); The Engraving Copyright Act 1766 (7 Geo 3 c 38); The Copyright Act 1775 (15 Geo 3 c 53); The Prints Copyright Act 1777 (17 Geo 3 c 57); The Sculpture Copyright Act 1814 (54 Geo 3 c 56); The Dramatic Copyright Act 1833 (3 & 4 Will 4 c 15); The Lectures Copyright Act 1835 (5 & 6 Will 4 c 65); The Prints and Engravings Copyright (Ireland) Act 1836 (6 & 7 Will 4 c 59); The Copyright Act 1836 (6 & 7 Will 4 c 110); The Copyright Act 1842 (5 & 6 Vict c 45); The Colonial Copyright Act 1847 (10 & 11 Vict c 95); The Fine Arts Copyright Act 1862 (25 & 26 Vict c 68); The Copyright (Musical Compositions) Act 1882 (45 & 46 Vict c 40); and The Copyright (Musical Compositions) Act 1888 (51 & 52 Vict c 17).

not all territories took the same approach as England. In France, the concern was far more focused on the rights of the author than on the right to copy. This focus on moral, rather than economic, rights over a work and regarding the control of works remains one of the greatest differences between French and Anglo-centric conceptions of copyright even to this day.[72] Pre-Revolutionary France utilised a system of privileges similar to that of England – the first French monopoly was granted before that of England.[73] Interestingly, where English privileges attached to books and therefore authors, the first French privilege was for the arrangement of a musical work, granted by King Henri III to his lutenist, Guillaume Morlaye, in 1551.[74] The monopoly, or privilege, was relatively short (3 to 10 years) with a possibility of renewal at the end of that term.[75]

In 1761, the granddaughters of celebrated French author Jean de la Fontaine were granted the right of ownership of his works by inheritance.[76] This decision of the Royal council sparked a debate in France which was similar to the Battle of the Booksellers discussed supra, questioning the nature of literary property. It was followed by two decisions in 1777 restricting the rights of publishers to the life of the original author.[77] These privileges, as they were issued by royal grant, were not law; this contrasts with the situation in the UK at the time, which by then had implemented the Statute of Anne.

During the French Revolution, in August of 1789, all privileges were abolished. This included privileges of printing, necessitating a new regime.[78] The first suggestion for this appeared in January of the following year, a proposed law by Abbé Sieyès, a notable French abbot, aimed at struggling against the spread of seditious material and ideas.[79] It spread the responsibility for this between publishers, authors, and government. It also suggested that privileges be limited, allowing for the eventual movement of works into the public domain. This would have released the works of such authors as Racine, Molière, Rousseau, and Voltaire into the public domain.[80] However, as Anne Latournerie eloquently states, this first tentative attempt to give authors a legal recognition

---

[72] Anne Latournerie, 'Petite histoire des batailles du droit d'auteur' (2007) 5 Multitudes 37 (French) 37-8.
[73] It was granted in 1551: ibid 39.
[74] ibid.
[75] ibid.
[76] ibid 41 « les ouvrages de leur aïeul leur appartenaient naturellement par le droit d'hérédité » (The works of their forefather naturally belonged to them through the right of inheritance).
[77] ibid.
[78] ibid 42.
[79] ibid.
[80] ibid 43.

of their rights was not truly an effort aimed at granting authors more freedom, but rather a disguised attempt at shifting responsibility on the part of others[81] and thus it did not succeed.

The next dispute to arise was centred on the use of theatrical works. The playwright Pierre-Augustin Beaumarchais headed a committee which presented a petition to the Harp Assembly in late 1790. This petition requested that authors have more rights over their works and, together with the outline of the proposal made by Sieyès, formed the backbone of the next proposal for a law, headed by Le Chapelier.[82] The essential difference was that Le Chapelier had added that authors had rights over the fruit of their own mind, which were intrinsically different to any other kind of property rights. It allowed authors control over the public performance of their works during their lifetime and extended inheritance rights of that control for five years pma.[83]

This was not, however, the law which was to prevail. The ultimate solution at the time was a law enacted in 1793, known as the Chénier Act,[84] which gave authors the exclusive right to distribute and sell their works. This right extended for ten years after the death of the author, and passed on to their heirs and assignees. In general, this law was well received, although it was subject to deposit of copies of the work with the Bibliothèque Nationale, similar to what was required in the UK, and it has later been criticised as being 'utilitarian'.[85]

Although the UK law was clearly concerned with the right to copy and controlling printing, thus demonstrating its essentially commercial concerns, the French development of similar laws was more concerned with the rights of the artist or creator. This is visible not only through the law itself, but also the range of artistic works which were considered from the very beginning – the grant of the first copyright-like monopoly to the musician Morlaye,[86] as opposed to the commercial printer Pynson in the UK,[87] is demonstrative of this attitude difference.

The United States

The early development of copyright in the United States, while not expressly imported from the English provisions, can easily be identified as having been strongly influenced by the development

---

[81] ibid 43 « ...la première tentative révolutionnaire de donner aux auteurs une reconnaissance légale de leur droits sur leur textes n'était donc pas la recherche d'une liberté pour les auteurs, mais plutôt l'exigence d'une responsabilité. »
[82] ibid 44.
[83] ibid 44.
[84] ibid 45.
[85] Peter K Yu, *Intellectual Property and Information Wealth: Copyright and related rights* (Greenwood Publishing Group 2007) 141–142.
[86] Latournerie (n 72) 39.
[87] Hauhart (n 20).

thereof. The first copying monopoly was granted in Massachusetts in 1672,[88] but there was not much development in terms of copyright before the American Revolution. Although at the time of the implementation of the Statute of Anne the United States was a British territory, it was never subject to the provisions of the Act, probably because it was not a colony which was greatly concerned with the importance of printing or copying. At the formation of The Articles of Confederation,[89] the first Constitution of the original thirteen United States, the Articles did not grant the authority to issue a copyright, but it did pass a resolution which suggested that States secure an exclusive right to copy for authors of a duration of not less than fourteen years, with an additional fourteen years if the author were to survive the first fourteen-year period.[90] These provisions were essentially identical to those of the Statute of Anne.[91] In the three years following this resolution, twelve of the thirteen States passed copyright statutes, with the majority following the Statute of Anne, and the other five providing copyright terms without renewal, for fourteen, twenty and twenty one years.[92] Delaware was the only State not to pass a copyright statute.[93]

Later in the 1780s, when the Constitution was being drafted, at the Constitutional Convention 1787, proposals were submitted to allow Congress to grant copyright.[94] This resulted in the inclusion of the 'copyright clause' in the United States Constitution, which was ratified in September of 1788. The clause, variously known as the Intellectual Property Clause, the Copyright and Patent Clause, the Patent Clause, and the Progress Clause, grants power to the United States Congress

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[95]

---

[88] – –, 'Usher's Printing Privilege, Massachusetts (1672)' in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org).
[89] Articles of Confederation and Perpetual Union (1781) (US).
[90] Raymond V Robinson, 'Confederate Copyright Entries' (1936) 16(2) The William and Mary Quarterly, Second Series 248.
[91] Yu (n 85) 142.
[92] Brian Pelanda, 'Declarations of Cultural Independence: The Nationalistic Imperative Behind the Passage of Early American Copyright Laws, 1783-1787' (2011) 58 Journal of the Copyright Society of the USA 431.
[93] Robinson (n 90) 248.
[94] Irah Donner, 'The Copyright Clause of the US Constitution: Why Did the Framers Include It with Unanimous Approval?' (1992) 36(3) The American Journal of Legal History 361.
[95] United States Constitution (1788) Art I, s 8, cl 8.

This particular clause, as one might expect from its various names, is the clause from which American copyright and patent law derives its authority. The inclusion of the phrase 'for limited times' also excluded the possibility of perpetual copyright or patent rights.

The copyright power granted by this clause was first executed in the form of the Copyright Act 1790.[96] It is an almost verbatim quotation of the Statute of Anne, with an additional provision for the extension of protection to maps and charts.[97] Along with the Statute of Anne, it did not extend protection to musical compositions or newspapers, nor did it prohibit the copying of foreign works.[98] Again, being copied from the Statute of Anne, it required that statutory formalities be met before the copyright would be issued – a lack of compliance with those formalities would result in the work falling into the public domain immediately. Among the requirements of these formalities was the statement that authors must include a copyright notice in their work.[99]

The first revision to this new US copyright legislation came in 1831, with another Copyright Act.[100] This first amendment extended the copyright term by a factor of two, from fourteen to twenty-eight years, and retained the option to renew (but only for fourteen years), meaning a possible tripling of the length of the copyright term.[101] It also allowed for a renewal being obtained by the author's widow or children in the event of their death, allowing for greater flexibility of copyright grants.[102] The Act further changed some of the formalities required to obtain a copyright grant.[103] The United States, in parallel to the UK, played host to a debate on the statutory versus the common law nature of copyright in the form of *Wheaton v Peters*,[104] an 1834 case which struck a blow against the idea of perpetual common law copyright. This case was not dissimilar to the earlier discussed *Donaldson v Beckett*.[105]

After the upheaval of establishing the United States, the American Civil War then reshaped the fledgling nation once more. The Confederate States implemented in 1861 an Act of Congress

---

[96] Copyright Act 1790, 1 Statutes At Large 124 (US).
[97] The long title of the Act was 'An Act for the encouragement of learning, by securing the copies of *maps, Charts, and books*, to the authors and proprietors of such copies, during the times therein mentioned', (emphasis added) indicating this inclusion.
[98] Copyright Act 1790 (n 96) s 5.
[99] ibid s 3.
[100] Copyright Act 1831, 4 Statutes at Large 436 (US).
[101] ibid ss 1-2.
[102] ibid s 2.
[103] Robinson (n 90).
[104] *Wheaton v Peters*, 33 US (8 Pet) 591 (1834).
[105] *Donaldson v Beckett* (n 56).

which was broadly similar to the pre-existing law.[106] This was amended in 1863 to allow the continued protection of the works of Confederate citizens or residents that had been registered under the laws of the United States before separation.[107] The same privilege was extended to Confederate copyrights after the Civil War, with their entry into the federal copyright records in the Library of Congress in 1870.[108]

While US copyright law was based on English law, its development is distinct from its predecessor. It retained formalities regarding the registration and deposit of copyright works for much longer than the UK, even as far as requiring registration in the 21st century in order to obtain statutory damages.[109]

The International Standardisation of Copyright Law

In the two hundred years following the implementation of the beginnings of modern copyright, seen in the form of the Statute of Anne, copyright developed separately and concurrently in other territories around the world. The fact that each country administered copyright separately meant that authors' rights were only protected in the country in which they first published their work. Thus, anyone could copy and publish a work in a country other than its country of origin. From this, the need arose for international protection of copyright. Although there is still no single copyright treaty which applies worldwide (and thus no copyright work is automatically protected worldwide), there are a variety of treaties, agreements, guidelines and legislation which provide agreement between countries to protect works originating elsewhere. In this section, three international agreements will be discussed as well as the legislative history of copyright in the European Union, culminating in the InfoSoc Directive, which was still in effect in 2015. This analysis of the history and the effect of international instruments will then inform the discussion of future measures which may or may not be needed to maintain an effective copyright regime in the face of the digital shift. While there are two international conventions which deal with copyright (the Berne Convention[110] and the Buenos Aires Convention[111]), this chapter will deal mainly with the Berne Convention. This is because, as of 23 August 2000, all parties to the Buenos

[106] Robinson (n 90) 248-9.
[107] ibid 249.
[108] ibid.
[109] 17 US Code § 412 - Registration as prerequisite to certain remedies for infringement.
[110] Berne Convention for the Protection of Literary and Artistic Works (1883).
[111] Buenos Aires Convention on Literary and Artistic Copyright (1910).

Aires Convention were also parties to the Berne Convention, and thus the Buenos Aires Convention had effectively been superseded.[112]

The Berne Convention 1886

In the late nineteenth century, at the behest of the French Association Littéraire et Artistique Internationale (ALAI), headed by Victor Hugo, the Berne Convention was developed.[113] Given that it was developed in France originally, the Berne Convention concentrates on the moral rights of authors more so than the economic concerns which were evident in UK legislation at the time. The Berne Convention for the Protection of Literary and Artistic Works was negotiated first in Berne, hence the name, in 1886. It was subsequently renegotiated a number of times, in Berlin,[114] Rome,[115] Brussels,[116] Stockholm[117] and lastly in Paris in 1971.[118] The Berne Convention followed the model of the Paris Convention,[119] which set out protection rules for patents, industrial designs and trademarks, and took those rules to apply them to copyright works. The Convention implements several requirements which standardised copyright, to a certain extent, on an almost global scale. In 2015 there were 168 states parties to the Berne Convention. [120]

The Berne Convention established several protocols which ensured that copyright works were protected in international territories. Like any international treaty, it has its flaws, but it was responsible for the implementation of several important international minimum copyright standards. Although originally applied to fewer categories of works, as of revisions made in Rome[121] and Brussels,[122] all production in the literary, scientific and artistic domains falls under the scope of the Berne Convention,[123] regardless of the mode of expression. This means that 'books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated

---

[112] The final country to ratify both the Berne and Buenos Aires Conventions was Nicaragua. WIPO, 'Contracting Parties: Berne Convention' (*WIPO)* <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> accessed 15 December 2015.
[113] Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar 2008) 26–27.
[114] Berlin Act (1908).
[115] Rome Act (1928).
[116] Brussels Act (1948).
[117] Stockholm Act (1967).
[118] Paris Act (1971).
[119] Paris Convention for the Protection of Industrial Property (1883).
[120] WIPO (n 112).
[121] Rome Act (n 115).
[122] Brussels Act (n 116).
[123] Berne Convention for the Protection of Literary and Artistic Works (as amended).

works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science"[124] are all included and protected. The Convention set out rights which must apply to those creative works as exclusive rights of authorisation, including translation,[125] reproduction,[126] public performance,[127] public recitation and communication to the public,[128] and adaptation of copyright works.[129] It also set out moral rights available by default to copyright authors.[130] The Convention established a minimum copyright term of fifty years pma for the majority of works. Exceptions to this general rule include anonymous or pseudonymous works, audiovisual works, and applied art and photographic works.[131]

Other standardised protections include:

National Treatment

The Convention requires that each member of the Berne Union (ie the signatories to the Convention)[132] must extend to nationals of other member countries the same protection afforded to its own nationals.[133] For the purposes of the convention, authors who are habitually resident in a Berne Union country are considered nationals of that country.[134] Thus, if a work is produced in any Berne Union country, it is protected by copyright in all Berne Union countries. This applies both to published and unpublished works.[135] Furthermore, this also applies to works published in a Berne Union country, even if not by a Berne Union national, and those works published simultaneously (defined in the Convention as within thirty days of first publication) in a Berne Union country and a non-Berne Union country.[136]

---

[124] Berne Convention (n 123) Art 2(1).
[125] ibid Art 8.
[126] ibid Art 9.
[127] ibid Art 11.
[128] ibid Art 11*ter*.
[129] ibid Art 12.
[130] ibid Art 6*bis*.
[131] ibid Art 7.
[132] ibid Art 1.
[133] ibid Art 5(3).
[134] ibid Art 3(2).
[135] ibid Art 3(1)(a).
[136] ibid Art 3(4).

Formalities

The Berne Convention abolished the need for formalities (such as registration and deposit) in order to avail of copyright protection. Although the Berne Convention was, at its beginnings, a small treaty, with only eight original signatories, it grew massively in popularity over the course of the 20th century. The United States, a notable exception to the growing acceptance of the Berne Convention, did not ratify Berne until 1988, a full century later. Although registration is not required for copyright to attach to works in the US, under its Berne obligations, registration is still required to obtain statutory damages in case of infringement.[137]

Rule of the Shorter Term

The Berne Convention establishes that the term of copyright protection for most types of works is the life of the author plus fifty years. It is permitted to provide a copyright term longer than this, thus it is recognised that some countries may have shorter terms of protection than others. Although the Convention states that the law of the country where protection is claimed will apply (*lex loci protectionis*),[138] it also stated that an author is not normally entitled to a longer term of protection abroad than at home.[139] Thus, the Convention introduced the Rule of the Shorter Term. This applies quite simply: where country A provides a term which is longer than that of the country of origin (country B) of a foreign work, country A may apply the shorter term to works from country B. Application of this rule is not mandatory.

Fair Use

The Berne Convention authorises the inclusion of 'fair' use of copyright works in other works or broadcasts.[140] This forms the basis of many fair use and fair dealing exceptions worldwide.

The Berne Three-Step Test

The Three-Step Test was first implemented in the Berne Convention, but it has been transposed into several other international copyright agreements, and thus remains one of the most important tests which applies in modern copyright law with regard to the fair exploitation of works. It is found in Article 9(2) of the Convention, and concerns the possibility of exceptions to copyright protection:

---

[137] 17 US Code § 412 - Registration as prerequisite to certain remedies for infringement.
[138] Berne Convention (n 123) Art 5(2).
[139] ibid Art 7(8).
[140] ibid Arts 10, 10bis.

> (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.[141]

This test has been transposed into many other copyright instruments, including the TRIPS Agreement,[142] the WIPO Copyright Treaty,[143] and the European InfoSoc Directive.[144] The interpretation of this particular test has been a contentious point at times,[145] but it remains one of the most enduring standards in determining fair uses in modern copyright law.

The three steps, quite simply are:

1. The reproduction must be in a special case
2. It must not conflict with a normal exploitation of the work
3. It must not unreasonably prejudice the interests of the author.

The Three-Step Test has been accepted as a standard for the establishment of fair use or fair dealing exceptions.[146]

BIRPI

The Berne Convention set up a small bureau to handle administrative tasks, similar to that which had been set up in order to administer the Paris Convention. In 1893, these two bureaux merged to form the United International Bureaux for the Protection of Intellectual Property, which was often referred to by its French acronym, BIRPI. Over the course of the next eighty years, BIRPI moved from Berne to Geneva in order to be closer to the United Nations and other international organisations, accepted the Rome Convention[147] in order to extend copyright protection to physical manifestations of intellectual property (such as audiocassettes, videotapes, DVDs) became the World Intellectual Property Organization (WIPO)[148] and became one of the United

---

[141] ibid Art 9(2).
[142] Agreement on Trade-Related Aspects of Intellectual Property, 1994 (TRIPS Agreement) Art 13.
[143] WIPO Copyright Treaty, 1996 (WCT), Art 10.
[144] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).
[145] See, for example, Martin Seftleben, *Copyright Limitations and the Three-Step Test* (Information Law Series Set Vol 13, Kluwer Law International 2004).
[146] It is on the basis of the three-step test that the Hargreaves exceptions discussed in Chapter 6 were implemented, as the test was transposed into the InfoSoc Directive (n 137).
[147] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961.
[148] WIPO was established by the Convention Establishing the World Intellectual Property Organization, 1970 which entered into force on 26 April 1970. It became a UN specialised agency in 1974

Nations' seventeen specialised agencies.[149] In late 2014, the WIPO Convention had 188 contracting parties: the Holy See, Niue, and 186 of the UN member states, with the seven UN member states who had not ratified the Convention being East Timor, Marshall Islands, Federated Stated of Micronesia, Nauru, Palau, Solomon Islands and South Sudan.[150] As WIPO, the organisation is tasked with protecting and promoting intellectual property in all its forms, as stated in the preamble to the WIPO Convention.[151]

TRIPS Agreement 1994

In 1947, the signing of the international trade agreement known as the General Agreement on Trade and Tariffs (GATT),[152] and the creation of the International Trade Organization (ITO) also laid down the framework for the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). In 1994, at the Uruguay Round of renegotiation of the GATT,[153] the TRIPS Agreement was one of many outcomes, alongside the establishment of the World Trade Organization (WTO). Ratification of the TRIPS Agreement is a necessary component of membership of the WTO. The TRIPS Agreement covers more than just copyright, running the spectrum of IPRs from patents to copyright and trademarks, and placing particular emphasis on the ideal of free access to medicines for all member states.

The copyright provisions in the TRIPS Agreement are largely based on those of the Berne Convention,[154] stating, 'members shall comply with Articles 1 through 21 of the Berne Convention' with the exception of Article 6*bis*.[155] This means that the TRIPS Agreement directly transposes requirements on what constitutes a literary or artistic work, national treatment, the abolition of formalities, the rule of the shorter term, the three-step test and the duration of the copyright term. Thus, for countries which may have been reluctant to ratify the Berne Convention, the temptation of membership of the WTO and access to the trade benefits associated with membership may be a powerful motivator to accept the TRIPS Agreement provisions.

The TRIPS Agreement differs from the Berne Convention in that it extends protection also to computer programs and compilations of data[156] and adds additional protocols regarding the

---

[149] Agreement between the United Nations and the World Intellectual Property Organization, 1974.
[150] WIPO, 'Contracting Parties: WIPO Convention' (*WIPO*) <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=1> accessed 15 January 2016.
[151] WIPO Convention (n 141), Preamble.
[152] General Agreement on Tariffs and Trade (GATT), 1947.
[153] General Agreement on Tariffs and Trade (GATT), 1994.
[154] TRIPS Agreement (n 135) Art 9.
[155] Article 6*bis* of the Berne Convention concerns moral rights.
[156] ibid Art 10.

duration of the copyright term when not based on the life of the author.[157] The TRIPS Agreement also has a separate national treatment clause, similar to the Berne and Paris Conventions.[158] It goes further than those, though, in requiring also most favoured nation (MFN) treatment.[159] MFN requires that WTO members accord to all other WTO members those advantages that it accords to its most favoured trading partner within the WTO, ensuring that the same privileges apply to all WTO members. There are several minor exceptions to this, but as a general rule, it requires that the treatment afforded to one WTO member be afforded to all WTO members. MFN is a practice applied to many WTO agreements.

The TRIPS Agreement is maintained and overseen by a WTO body known as the Council for TRIPS, ensuring that WTO members meet their obligations under the Agreement. The objective of the Agreement, as stated in Article 7, is to:

> contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.[160]

The sheer size of the WTO, combined with the ratification of the TRIPS Agreement as a requirement of membership, means that the international reach of the TRIPS Agreement is considerable.

WIPO Copyright Treaty

In the early 1990s, it became clear that the Berne Convention was failing to protect some aspects of copyright which could not have been envisaged in the less technologically advanced world which existed when the Berne Convention was agreed and renegotiated. Thus, in order to deal with some of the newer aspects of copyright which required agreement, the WIPO Copyright Treaty (WCT) was adopted.[161]

---

[157] ibid Art 11.
[158] ibid Art 3.
[159] ibid Art 4.
[160] ibid Art 7.
[161] WCT (n 136).

The Treaty is a special agreement under Article 20 of the Berne Convention,[162] and extends copyright protection to computer programs,[163] and compilations of data (databases) which constitute intellectual creations 'by reason of the selection or arrangement of their contents'.[164] It also extends the rights of distribution and rental which might otherwise not have been available under the Berne Convention proper.[165] It prohibits the circumvention of technological measures designed to protect works[166] (TPMs) and modification of rights management information without authorisation.[167] The WCT was accompanied by a matching treaty on the topic of related rights, the WIPO Performances and Phonograms Treaty (WPPT),[168] which provides similar protection to that provided by the WCT for performers and producers of phonograms who are nationals of contracting states, including on TPMs and rights management information.[169]

The WCT has not been so widely accepted as the Berne Convention proper, with only 94 countries being signatories.[170] This may be because the Treaty does not take into account regional differences between most and least developed countries with regard to copyright enforcement,[171] or because the treaty may be viewed as too heavy-handed in certain aspects. Certainly, with regard to TPMs, considering the existence of personal copying exceptions in many states, the inability to circumvent TPMs in lawfully making copies of legitimate creative content is an onerous requirement. Ratification of the WCT has been slow, with implementation across the EU member states only coming into effect in March of 2010,[172] and Canada's implementation in 2014, almost two decades after the Treaty was first signed.[173]

While the ideas of the WCT are laudable in providing extra protection for copyright in light of the technological advances which have surged through in the last thirty years, a treaty written in

---

[162] 'Governments of the countries of the Union reserve the right to enter into special agreements among themselves …' Berne Convention (n 123) Art 20; WCT (n 136) Art 1.
[163] WCT (n 136) Art 4.
[164] ibid Art 5.
[165] ibid Arts 6-8.
[166] ibid Art 11.
[167] ibid Art 12.
[168] WIPO Performances and Phonograms Treaty 1996 (WPPT).
[169] WPPT (n 160) Arts 17-18.
[170] WIPO, 'Contracting Parties: WPPT' (*WIPO*) <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20> accessed 15 December 2015.
[171] The TRIPS Agreement, by contrast, makes special provisions for least developed countries, WTO, 'Responding to least developed countries' special needs in intellectual property' (*WTO.org* 16 October 2013) <https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm> accessed 15 December 2015.
[172] WIPO, 'Contracting Parties: WCT' (*WIPO*) <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16> accessed 15 December 2015.
[173] ibid.

the mid-1990s could not possibly have envisaged the explosion of digital content which overtook the copyright sphere in the two decades following its agreement, and thus it is perhaps not as relevant as those who envisaged it may have hoped. While the WCT does provide important extra protection for computer programs and databases, this protection is duplicated by the TRIPS Agreement and other aspects of the Treaty fail to consider the copyright landscape of the modern world.

European Union Directives

The harmonisation of copyright law in the EU can be traced back as far as the signature of the Berne Convention, in 1886 – all European Member States are signatories. It is also a requirement of accession to the EU to comply with the provisions of the Convention.[174] In the interests of promoting the economic, political, and legal union of the European Union, copyright is one of the areas which has been the source of extensive legislation in an attempt to harmonise the law between the now 28 member states. Thus, although as mentioned, all EU Member States are by necessity Berne Convention signatories, there are many additional Directives which implement varying degrees of copyright standardisation across the union.

Copyright harmonisation began in the EU with the adoption of the Computer Programs Directive[175] in 1991 (note that this pre-dates both the TRIPS Agreement and the WCT), which extended copyright protection to Computer Programs. It was a notable event in European copyright law, being the first time that copyright law was harmonised in any way between European member states.[176] The following year (1992) marked a second Directive, creating Rental Rights,[177] setting out minimum standards for the holders of related rights – ie those relating to performers, phonogram and film producers and broadcasting organisations – and allowed those rights holders the exclusive right to authorise or prohibit the lending or rental of their works. The Rental Directive was codified and updated in 2006.[178] It was only a year after the Rental Rights

---

[174] EU Community Acquis, Ch 7: Intellectual Property – the body of legislation to which members of the EU are required to submit.
[175] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42.
[176] The most recent version of this Directive was implemented in 2009: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16.
[177] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L346/61.
[178] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28.

Directive that two more Directives on copyright were introduced. The Satellite and Cable Directive[179] granted the right of communication to the public by satellite for authors, performers, producers of phonograms and broadcasting organisations, allowing them to permit or forbid the broadcasting of their works via satellite, [180] while the Duration Directive standardised the copyright term across the European Union, at seventy years pma.[181] Although this may be seem to have been an extension of all lesser copyright terms (such as those under the Berne Convention) to the longest term in the EU at the time, this is not strictly true. France, at the time, gave a copyright term of eighty years pma to those who had died in the service of their country ('mort pour la France'). This has survived still, in the form of a thirty-year extension over the usual 70-year pma copyright term, although no author has been listed as mort pour la France since 1945, nor any composer since 1946.[182] Similarly, Spain had had an eighty year pma term, which was changed only in 1987,[183] meaning that copyright coming into effect until that time was still in force, and indeed continues to be in force today. The Directive also provided extensive guidance on when date of publication of performances, phonograms, films, photographs, and broadcasts should be calculated from, and how for long those related rights should stay in force.

After the implementation of the Duration Directive, several questions arose as to whether works which had existed before the Directive came into force were protected by the Directive – ie were works able to be pulled back out of the public domain? As the *Butterfly*[184] case showed, they were indeed protected, even if they had previously fallen into the public domain. The court chose to apply the Directive to those works, the effect of which was seen in the *Puccini*[185] case not long after. This case was important not only because it confirmed the *Butterfly* ruling but also because it ruled that the application of the Rule of the Shorter Term was discriminatory and thus in breach

---

[179] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15.
[180] Satellite and Cable Directive (n 179) Arts 2, 4.
[181] Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [1993] OJ L290/9.
[182] Code de la Propriété Intellectuelle (Livre I - Titre II), Art L 123-10.
[183] In 1987, Spain changed their copyright law, resulting in the still-active Ley 22/1987, de 11 de noviembre, de Propiedad Intelectual: *Boletín Oficial del Estado* núm 275, del 17 de noviembre de 1987.
[184] *Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED)* (Case C-60/98). In this case, the implementation of legislation which extended the copyright term from 30 years to 50 years pma revived the copyright of those works which had fallen into the public domain but were within the new 50-year pma period.
[185] *Land Hessen v G Ricordi & Co Bühnen- und Musikverlag GmbH* (Case C-360/00) 6.

of Article 12 of the EC Treaty[186] – thus it could no longer apply in Europe and all works should be protected for their longest possible duration. Of course, the implementation of the Duration Directive means that such cases should no longer arise. The Duration Directive was updated several times; in 2006 all changes were consolidated into the Copyright Term Directive.[187]

Shortly after this, in 1996, the Database Directive[188] extended protection further for databases by creating a *sui generis* right for the creators of databases which did not fall under copyright requirements established in the TRIPS Agreement, as well as the database right. The database right covered both electronic and hard copy databases, and protected those databases which could be considered creative works 'by reason of the selection or arrangement of their contents'.[189] The *sui generis* right applied to those databases which aimed to be complete and thus had no discretion in selection or arrangement. There is a requirement, however, that a substantial investment (eg time, money) must have been made in the database.[190] It may be considered analogous to the rights of phonogram producers in that they are related to copyright, but are not true copyright. The term of protection for the *sui generis* right is fifteen years, but the timer could be reset if substantial changes are made.

In 2001, a new Copyright Directive to harmonise EU copyright law was implemented, with multiple purposes, including ratifying the WCT and allowing for copyright exceptions. Variously known as the Copyright Directive, the Information Society Directive or the InfoSoc Directive,[191] it was, at the time, somewhat controversial, as seen by the fact that there have been no fewer than six judgments against member states for non-transposition of the Directive.[192] The Directive specified and separated the rights of reproduction from the right of communication to the public and the making available right (which have two names thanks to the combination of the WCT and

---

[186] Treaty establishing the European Economic Community, 1957 (TEEC), now repackaged as the Treaty on the functioning of the European Union, 2007 (TFEU).
[187] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version) [2006] OJ L372/12.
[188] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.
[189] ibid Art 3.
[190] ibid Art 7(1).
[191] InfoSoc Directive (n 137).
[192] *Commission of the European Communities v Kingdom of Spain* (Case C-31/04), *Commission of the European Communities v Republic of Finland* (Case C-56/04), *Commission of the European Communities v French Republic* (Case C-59/04), *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C-88/04), *Commission of the European Communities v Kingdom of Sweden* (Case C-91/04), *Commission of the European Communities v Kingdom of Belgium* (Case C-143/04).

the WPPT), with the intention of specifically covering publication and distribution via the internet.[193] Thus, even with the advent of easy online distribution, authors should, in theory, still have been able to control their own works.

The Directive further allowed Member States to implement certain exceptions to copyright law for a variety of purposes, including teaching and scientific research, quotation, private use, incidental inclusion of a work in other material, use of works located permanently in public places and many more.[194] Several of these exceptions were implemented in the UK in 2014, and two of them are specifically discussed in Chapter 6. The implementation of these exceptions is, according to Article 5(5), subject to 'certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder',[195] which is a reiteration of the Berne Three-Step Test, as discussed earlier.

The InfoSoc Directive required of member states that they provide adequate legal protection against the circumvention of TPMs, similar to the WCT.[196] The Directive also requires that member states provide protection against the manufacture, import, distribution or advertising of materials designed to circumvent TPMs. The Directive prevents circumvention not only of access measures, but also copy protection measures, which renders it quite restrictive – even in countries where private copying is lawful, circumventing copy protection is not, nor should there be any materials available to aid in the circumvention of such protection.

The Directives discussed here are only some of the EU Copyright Directives – they serve to show the extent and breadth of harmonisation and development of European Copyright law. However, there is still also variation between member states in the level of copyright protection they provide. The optional nature of the copyright exceptions in the InfoSoc Directive as well as the differing Continental/civil law and UK & Ireland/common law attitudes to moral rights also leave space for differing interpretations of copyright protection. However, it is clear from the swathe of Directives standardising copyright that EU Member States have a strong commitment to protecting copyright which continues into 2015 and beyond.

Conclusion

When one considers the development of copyright from its very early stages, it is clear to see that there has always been debate over the provenance of copies of books, and the permissibility of

[193] InfoSoc Directive (n 137) Arts 2 & 4.
[194] ibid Art 5(3).
[195] ibid Art 5(5).
[196] ibid Art 6.

reproducing works without the permission of the original owner. However, it would be foolish to think that the implementation of the Statue of Anne, more than three centuries ago, was the single most influential event in copyright history. Objectors to copyright may cite its UK beginnings, which were certainly steeped in ideas of monopoly, censorship, and control, as reasons for abolishing copyright as it currently stands,[197] but to argue on this point is short-sighted and reductive and fails to take into account the merging of copyright ideals as viewed in different countries. The development of copyright over the three hundred years since the implementation of the Statute of Anne has moved decisively away from its origins in control by publishers towards a more open arena where authors and content creators have more control over the ways in which their work is exploited.

Certainly, the shift of rights from publishers to authors was a watershed event in the history of the book, but over the intervening three hundred years, where the original intention was for publishers to maintain control, the development of copyright has given far more autonomy to content creators. The development simultaneously of rights in different countries can be considered either an indictment of the Church's desire to control the spread of ideas or a representation of the fact that floodgates of information leave one with a need for something to navigate through the swift-moving waters of creative content. The truth lies somewhere between these two, with, of course, variation between one side and another throughout the years. IP legislation, copyright included, needs to walk a fine line between encouraging creativity and protecting creators.

The development of national, regional,[198] and near-global[199] law on copyright has shown clearly that there is respect (almost world-wide) for the effort and artistry which goes into producing creative content and that there is, and has been, a movement towards greater protection of authors' rights with regard to their creative content. The extension of rights beyond simply printed material to the variety of new forms of content[200] which have developed through the intervening centuries, combined with multilateral agreements ensuring protection of creative works in multiple territories, without the need for multiple registrations,[201] are strong examples of the development of copyright with regard to protecting content creators. The sad corollary of

---

[197] See, for example, the Copy-me web series, Episode 3: Early Copyright History, available in Alex Lungu, 'Ep 3: Early Copyright History' (*copy-me.org,* 13 October 2014) <http://copy-me.org/2014/10/copy-me-webseries-early-copyright-history-episode-3/> accessed 17 November 2015.
[198] See section on European Union Directives.
[199] See section on The Berne Convention 1886.
[200] Compare, for example, the long title of the Statute of Anne (n 1) to the list of protected materials in Berne (n 123) Art 2(1).
[201] WCT (n 136).

increased protection, however, is that enforcement mechanisms are required in order to maintain this level of protection. These measures will be discussed in the next two chapters, which will consider several implementations of protection of copyright materials, through graduated response mechanisms, notice and takedown, and blocking injunctions.

Copyright as a property right has seen much change since its legislative debut in 1710. However, two things have remained clear throughout the storied history of copyright. The first of these is that copyright is an essential property right, which must be maintained in order to protect content creators and ensure the continuation of the creative industries. The second is that copyright as a doctrine is flexible and adaptable – capable of assimilating great change, from the inclusion of new forms of creative content[202] to the development of new forms of distribution. Copyright laws can be adjusted, changed, added to, or developed without losing the essential thread of what copyright protects – the right of the author to control what happens to their work, and balancing this against the ability to distribute information and artistry. This flexibility and adaptability is more important than ever before as copyright attempts to deal with the shift to digital, and the changes in usage habits which have accompanied this.

[202] Rental Rights Directive (n 170).

Chapter 3: A Legal Investigation of Copyright: Graduated Response

Introduction

With the advent of digital came the advent of online piracy. For consumers, the ability to reproduce and share files led to a proliferation of high-quality copies with no degradation; from a scratchy home taping of a radio song to a full-quality digital file, the difference which digital made to piracy was indescribable. The development of online sharing systems such as Napster allowed consumers to share and exchange music at no cost, and astonishingly fast, with little concern (or wilful ignorance) for the ethical or legal status of their actions.[1] The reproduction and sharing of files exploded in popularity not long after this – some experts estimated that online copyright infringement resulted in losses of hundreds of billions of dollars per year globally.[2] The UK government's Online Copyright Infringement Tracker suggested slightly more modest figures, stating that 62% of those surveyed had accessed content online, and estimating that 18% of UK internet users had infringed copyright during the three-month period of observation.[3] While these figures are debatable, there is still no doubt that online copyright infringement has had an effect on both creators' businesses and consumers' expectations. For consumers, the ease of piracy and the lack of penalties in the beginning meant that it was an attractive and easy way to obtain digital content, and they did not necessarily think that it was unacceptable.[4] Thus, a need arose for methods of deterring and redirecting copyright pirates, in order to ensure that creative content was obtained legitimately. In the beginning, this focused more on the deterrent than the redirection aspects of copyright enforcement, but evolved over the course of the following years. This chapter discusses the rise and metamorphosis of Graduated Response (GR) systems through the use of several different examples around the world. Generally speaking, a GR system uses a series of escalating measures to deter consumers from copyright infringement. Although the earliest systems envisaged penalties such as fines and eventual termination of internet

---

[1] Tom Lamont, 'Napster: The Day Music Was Set Free' (*The Guardian*, 24 February 2013) <http://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing> accessed 15 December 2015.

[2] See, for example, Center for Strategic and Innovation Studies, 'Net Losses: Estimating the Global Cost of Cybercrime' (2014) 12 <www.mcafee.com/uk/resources/reports/rp-economic-impact-cybercrime2.pdf> accessed 20 January 2016, which puts annual losses from counterfeiting and piracy at US$638 billion.

[3] Kantar Media Monitoring, 'Online Copyright Infringement Tracker Wave 5' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449592/new_OCI_doc_290715.pdf> accessed 15 December 2015. The issue with these figures, of course, is that it assumes that in the absence of illegal downloading, consumers would and could pay for the same content. This is a simplistic view, at best.

[4] Måns Svensson and Stefan Larsson, 'Intellectual property law in Europe: Illegal file sharing and the role of social norms' (2012) 14(7) New Media and Society 1147.

subscriptions, over the course of their lifespan, GR systems have evolved to become more about education than penalisation.

Graduated Response

Graduated Response systems have been adopted in several different jurisdictions (France, the US, New Zealand, Taiwan, South Korea, Ireland, Canada, Australia) as well as being envisaged in others (including the UK). Also known as '3 strikes' systems, these systems, while different in practice, all share the idea that copyright infringers should be subject to a system of increasing penalties for repeated copyright infringement. The original '3 strikes' title is taken, presumably, from the game of baseball, via the California penal system,[5] but while France uses three strikes, other countries' number of strikes varies.

GR systems are a brainchild of the 21st century, with one of the earliest adopted being France's Hadopi[6] law, administered by the organisation of the same name, which was established in 2009. In the six years following Hadopi's introduction, the idea spread around the world, especially the Anglophone world, with several more GR systems being introduced before the end of 2015.

This chapter considers France's Hadopi, followed by New Zealand's GR system.[7] It then discusses Canada's notice and notice system. The chapter then turns to voluntary response systems in the form of the US Copyright Alert System and Ireland's Eircom and UPC GR systems. The discussion touches upon the Australian voluntary system due to come into existence in 2015 and finally considers the GR system envisaged for the UK in the 2010 Digital Economy Act and the subsequent VCAP/Creative Content UK initiative.

One particular point to note is that the majority of GR systems are focused on peer-to-peer (P2P) download models. These systems have been in existence since before the turn of the millennium, with Napster being one of the first examples of P2P,[8] through various other models to the currently popular BitTorrent model. They function by downloading files from a peer network of computers connected through the internet. P2P downloading is not illegal *per se*. It is only when

[5] California's penal laws enforce stricter penalties on a third offence. Ahmed A White, 'The Juridical Structure Of Habitual Offender Laws And The Jurisprudence Of Authoritarian Social Control' (2006) 37(3) The University of Toledo Law Review 705.
[6] Haute autorité pour la diffusion des œuvres et la protection des droits sur internet.
[7] While Taiwan and South Korea also have legislative graduated response systems, the author elected to use New Zealand and France as legislative case studies for ease of language, time, and space constraints.
[8] Lamont (n 1).

the files downloaded are subject to copyright that they violate the rights of the content owner. Thus, it is important to note that not all P2P clients are torrent clients – indeed, Skype and the BBC iPlayer use P2P systems. At present, a significant proportion[9] of infringing downloads are conducting using the BitTorrent protocol of P2P downloading, commonly known as torrenting.[10] BitTorrent protocols allow a user to create a small descriptor file distributed through normal means (email, discussion forum, or torrent aggregator sites, such as The Pirate Bay). The original user then makes the full file available through a BitTorrent node, creating a 'seed'. The descriptor file will connect a second user to this node. Each secondary user, who 'leeches' the file can then in turn 'seed' it, reducing the load on the original computer and allowing faster downloading. This collective sharing is known as a 'swarm'. Speed and ease are also increased by the fact that the files are broken into 'pieces', which are then downloaded (usually non-sequentially) and rearranged by the second user's BitTorrent client (examples of BitTorrent clients include – confusingly – BitTorrent, Vuze and µTorrent). Theoretically, a user could 'seed' an original file once and have unlimited downloads thereafter, with only one download being made from their own terminal. This leads to difficulties in identifying those who are uploading infringing files in the first place – the existence of a swarm means that anyone who downloads a torrent can potentially redistribute it an unlimited number of times, and in fact some do. The existence of the swarm, combined with files being downloaded in pieces, means that users can download from many different other users, and equally can seed to many other downloaders. P2P networks can be monitored, on behalf of GR schemes, by private companies, which was what the French system did, using Trident Media Guide.[11] While the exact operation of such monitoring systems were not public knowledge, attempts were made to discern what proportion of torrented content was monitored. In 2012, one study found that for popular content a user could be monitored within three hours of joining a swarm.[12]

This is contrasted against direct download, file locker or one click hosting sites, which are another method of downloading. In this method, users upload a file to a file hosting site, and then populate

---

[9] Kantar Media Monitoring (n 3); 21. 26% of infringers used P2P services, with 17% using µTorrent, the most popular torrent client – this has remained consistent since wave 1 of this research.
[10] Johan Pouwelse and others, 'The Bittorrent P2P File-Sharing System: Measurements and Analysis' in Miguel Castro and Robbert van Renesse (eds) *Peer to Peer Systems IV* (Springer 2005).
[11] Lawrence Latif, 'French ISPs will be flooded by IP address information requests' (*The Inquirer,* 22 September 2010) <http://www.theinquirer.net/inquirer/news/1734781/french-isps-flooded-ip-address-information-requests> accessed 15 December 2015.
[12] Tom Chothia and others, 'The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent' in Angelos D Keromytis and Roberto di Pietro (eds) *Security and Privacy in Communication Networks* (Springer 2013).

the link from there. A second user who has the link can then download the file in its entirety from this location, via the link. Direct download is slower than torrenting, as files are downloaded from a single location, but it is less dangerous for the downloader – they are not then making themselves a secondary uploader of the file. Population methods of the link are similar to those of torrent descriptor files, via email, message boards, or dedicated link aggregation sites.

Most GR systems focus on P2P downloading, but other systems, including notice and takedown, which is discussed in the following chapter, also target one click hosting sites.

France

In France the Hadopi law[13] of June 2009 created one of the first GR systems. The law, administered by an organisation of the same name, took effect in late 2009. Shortly after its introduction to the French Senate, in October 2008, the bill was made a matter of urgency under article 45 of the French constitution, meaning that it could only be read once in each House. Its introduction process was then shortened to a mere eight months. In June 2009, after passing through both Houses with some amendments, the Constitutional Council declared the main part of the bill unconstitutional.[14] Even still, a revised version was approved in October 2009, retaining the majority of the original bill's structure. The passage of the bill took only a single year from introduction to approval, including revisions.

The Hadopi law created a government agency to enforce the provisions of the law. It, confusingly, is also called Hadopi. Hadopi (the agency) superseded the mandate of the previous ARMT,[15] while maintaining most of its mandates. The agency was vested with the power to police internet users. While the name and nature of Hadopi suggest that it was responsible for technological measures applicable to all creative content, in actuality it applied only to audio-visual content.[16] That is to say, Hadopi had no authority with regard to online content infringement if it concerned books, games, software, or other creative content.

---

[13] loi no 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet (France).
[14] Patrick Roger and Jean-Baptiste Chastand, 'Hadopi: le Conseil constitutionnel censure la riposte graduée' (*Le Monde,* 10 June 2009) (French) <http://www.lemonde.fr/technologies/article/2009/06/10/hadopi-le-conseil-constitutionnel-censure-la-riposte-graduee_1205290_651865.html> accessed 22 December 2015; Nicola Lucchi, 'Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression' (2007) 19 Cardozo Journal of International and Competition Law 645.
[15] Autorité de Régulation des Mésures Techniques.
[16] loi no 2009-669 du 12 juin 2009 (n 13).

Hadopi employed a three strikes policy through monitoring P2P downloads. On receipt of a complaint from a copyright holder or representative, Hadopi would send an email to the offending internet subscriber stating that there has been a complaint, but not the substance of the claim nor the identity of the complainant. The subscriber's ISP was then required to monitor the internet connection in question. The subscriber was also invited to install a filter on their internet connection. In the six months following this, if a repeat offence was noted by the copyright holder, their representatives, the ISP, or Hadopi, then a certified letter would be sent to the subscriber with content similar to the email. In the event that, in the 12 months following receipt of the letter, the offender failed to comply and there were accusations of repeat offences by the copyright holder, a representative, Hadopi, or the ISP, then the ISP would be required to prepare an investigation and a report recommending whether or not the subscriber's internet access should be suspended. The file would then be forwarded to prosecutors, with a judge making the final decision on a fine (up to €1500) or suspension (up to one year) or both.[17] The subscriber would be blacklisted, meaning that other ISPs were prohibited from providing service to them. This suspension would not interrupt billing, and the subscriber was still liable for any and all charges or costs arising from the suspension. It was possible to appeal the length (but not the existence) of the blocking of internet access in court, with the burden of proof falling on the appellant.[18] Action under the Hadopi law would not preclude separate action under the French code of intellectual property.[19]

Hadopi, until 2013, issued a large number of first emails, substantially fewer second letters, and recorded only one suspension of internet access, coupled with a fine of €600[20] in the four years of its operation. Over a million emails were sent, along with 99,000 letters, resulting in only 134 cases being examined for prosecution.[21] Of those cases, four actually went to trial, resulting in two fines

---

[17] Eric Pfanner, 'France approves wide crackdown on net piracy' (*The New York Times,* 22 October 2009) <http://www.nytimes.com/2009/10/23/technology/23net.html?_r=0> accessed 15 December 2015.
[18] Sylvain Dejean, Thierry Pénard and Raphaël Suire, 'Une première évaluation des effets de la loi Hadopi sur les pratiques des Internautes français' (2010) (French) <http://www.marsouin.org/IMG/pdf/NoteHadopix.pdf> accessed 22 December 2015.
[19] Code de la propriété intellectuelle, arts L331-1 and L335-2.
[20] Marc Rees, 'Hadopi : 600 € d'amende et quinze jours de suspension pour un abonné' (*NextInpact*, 12 June 2013) (French) <http://www.nextinpact.com/news/80487-hadopi-600-d-amende-et-quinze-jours-suspension-pour-abonne.htm> accessed 22 December 2015; ZDNet, 'Hadopi : première suspension de connexion Internet infligée à un internaute' (*ZDNet*, 12 June 2013) (French) <http://www.zdnet.fr/actualites/hadopi-premiere-suspension-de-connexion-internet-infligee-a-un-internaute-39791358.htm> accessed 22 December 2015.
[21] Ben Challis, 'Hadopi "failure" a warning for the UK?' (*The 1709 Blog,* 8 August 2012) <http://the1709blog.blogspot.com.br/2012/08/hadopi-failure-warning-for-uk.html> accessed 22 December 2015; Boris Manenti, 'Aurélie Filippetti: "Je vais réduire les crédits de l'Hadopi"' (*O,* 1 August 2012)

and the aforementioned suspension.[22] Interestingly, both fines mentioned were issued not for the offence of actual content infringement, but for the lesser offence of failing to secure one's internet connection – this was punishable at the time by a suspension of up to one month and a fine of up to €1,500. The suspension, incidentally, was never enacted, due to the abrogation of the powers a few days after the judgement.[23]

In 2012, Hadopi released a report stating that they had cut piracy by almost 50% since the introduction of the law.[24] This overwhelmingly positive report was derided[25] as 'massaging' the numbers to make them look better. French newspaper Le Figaro pointed out[26] that while there had been a decline in P2P downloads since the first warning notices issued by Hadopi, there was also a similar increase in streaming. Equally, correlation between the introduction of Hadopi and a decline in P2P activity did not necessarily indicate causation. However, Hadopi was also defended in some areas. The defence raised was that Hadopi was not necessarily a copyright infringement prosecutor, but also an education and awareness mechanism. Thus, a lack of second or third warnings could be seen as a positive effect, rather than a negative one.

> The good news is that HADOPI appears to be succeeding as an education program rather than as a punitive one. In 2011, HADOPI reports that fully 96% of people who received a first warning message did not receive a second one; this number stayed about the same in 2012. In addition, the percentage of people who received second notices but not third ones rose from 90% to 98% from 2011 to 2012. (The legal steps that could lead to fines or suspensions begin after the third notice.) To buttress this data, HADOPI has published results

---

(French) <http://obsession.nouvelobs.com/high-tech/20120801.OBS8587/aurelie-filippetti-je-vais-reduire-les-credits-de-l-hadopi.html> accessed 22 December 2015.

[22] Valéry Marchive, 'Three years and millions of euros later, Hadopi has its first conviction. Now what?' (*ZDNet,* 30 October 2012) <http://www.zdnet.com/three-years-and-millions-of-euros-later-hadopi-has-its-first-conviction-now-what-7000006612/> accessed 22 December 2015.

[23] Stephen Shankland, 'French three-strikes law no longer suspends Net access' (*CNet.com*, 10 July 2013) <http://www.cnet.com/news/french-three-strikes-law-no-longer-suspends-net-access/> accessed 15 December 2015.

[24] Hadopi, 'Hadopi, 1 an ½ après son lancement' (2012) (French) <hadopi.fr/sites/default/files/page/pdf/note17.pdf> accessed 22 December 2015.

[25] See Monica Horten, 'Hadopi – has it massaged the numbers?' (*IPTegrity.com*, 30 March 2012) <http://www.iptegrity.com/index.php/france/755-hadopi-has-it-massaged-the-numbers> accessed 22 December 2015.

[26] Benjamin Ferran, 'Le bilan contrasté de l'action de l'Hadopi' (*Le Figaro*, 28 March 2012) (French) <http://www.lefigaro.fr/secteur/high-tech/2012/03/27/01007-20120327ARTFIG00670-le-bilan-contrastee-de-l-action-de-l-hadopi.php> accessed 22 December 2015.

> from four independent research reports that note significant decreases in illegal downloading in 2011.[27]

Despite the positive reports published by Hadopi showing a significant decrease in piracy, the agency was not as successful as one might have hoped. In July 2013 the French Ministry of Culture effectively took the teeth away from the Hadopi consumer initiative by removing the provision of 'the additional misdemeanour punishable by suspension of access to a communication service'.[28] This is the provision under which the only suspension was issued – failure to secure an internet connection. Hadopi still retained an automated system of fines, up to €1,500 in the case of gross negligence and the ability to suspend access in the case of the greater offence of content infringement, but the press release which announced these changes specifically stated that suspension was no longer seen as an appropriate remedy.[29] The Hadopi agency's powers were transferred to the CSA.[30] This was in accordance with the recommendations of the Lescure report, a report published by Pierre Lescure and delivered to the French Government on the Cultural Exception in France, which found that Hadopi had not achieved its aims, as traffic was being redirected to other avenues of infringement, rather than to legitimate sources.[31]

Following on from that, even the assertions that Hadopi was effective as an educational and deterrent organisation were called into question. In their paper on Hadopi,[32] Arnold and others suggested that the Hadopi law had no deterrent effect on the behaviour of pirates. Their comprehensive paper highlighted that Hadopi monitored only P2P downloads, and not direct download or digital lockers, although it noted also that many consumers were not aware of this.[33] Thus, those with the required technical knowledge (and it is a fairly low standard) could easily have avoided the monitored channels and thus detection. While the report is almost entirely

---

[27] Bill Rosenblatt, 'The Future of HADOPI' (*Copyright and Technology,* 26 October 2012) <http://copyrightandtechnology.com/2012/10/26/the-future-of-hadopi/> accessed 22 December 2015.
[28] Décret no 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L 331-21 du code de la propriété intellectuelle.
[29] Minister for Culture and Communication (France), 'Publication du décret supprimant la peine complémentaire de la suspension d'accès à Internet' (Press Release, 9 July 2013) (French) <http://www.culturecommunication.gouv.fr/Presse/Communiques-de-presse/Publication-du-decret-supprimant-la-peine-complementaire-de-la-suspension-d-acces-a-Internet> accessed 22 December 2015.
[30] Conseil Supérieur de l'Audiovisuel [Audio-visual Council].
[31] Pierre Lescure, 'Mission "Acte II de l'exception culturelle" Contribution aux politiques culturelles à l'ère numérique' (2013).
[32] Michael A Arnold and others, 'Graduated Response Policy and the Behavior of Digital Pirates: Evidence from the French Three-Strike (Hadopi) Law' (2014) SSRN <http://ssrn.com/abstract=2380522> accessed 22 December 2015.
[33] ibid 14.

theoretical, given the low number of warnings issued by Hadopi, it did make use of surveys of 2,000 French users to test their theoretical model, with results in which they could be relatively confident. Arnold and others also disagreed with the assertions made by Danaher and others[34] that the implementation of the Hadopi law resulted in increases on iTunes of 22.5% and 25% in song sales and album sales, respectively. They attribute this increase in iTunes revenues to awareness campaigns launched around the time of the passing of the Hadopi law, and not the deterrent effect of the law itself.

The removal of the internet cut-off provision from the possible penalties which Hadopi may implement, combined with the fact that the agency's authority was passed over to the CSA mean that it is not difficult to see from where a lack of confidence in the effectiveness of the Hadopi law may stem. The provisions still stand; P2P downloads are monitored, with letters and penalties still being issued, but this author finds it difficult to view an agency which in four years only imposed ultimate sanctions on one person as particularly effective. This, combined with the fact that it is difficult to find information on this particular case, or even the fact that disconnection and a fine were actually imposed, means that this author is not convinced that Hadopi (either the agency or the law) was the success that it was originally touted to be. Rather, with the focus of the French government moving toward commercial piracy rather than individual infringers,[35] Hadopi seems to have faded into the background as a failed experiment.

Regardless of opinion on its educational value, it is clear that Hadopi, as an enforcement mechanism, was not as effective as might have been hoped. It is certainly worth considering whether or not Hadopi's failure may serve as a bad omen for the possible implementation of a UK GR scheme. Nevertheless, there is something positive to take from the example of Hadopi – the positive effect of the educational program launched at the same time as the deterrent three strikes system was hailed as effective, and certainly worth noting. Furthermore, the Hadopi agency continues to conduct research into infringement, such as through its Research, Studies and Monitoring Department,[36] which makes its works available online on the Hadopi website.[37] Certain works are also available translated into English,[38] including their 2013 paper 'Access to

---

[34] Brett Danaher and others, 'The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France' (2012) SSRN <http://ssrn.com/abstract=1989240> accessed 22 December 2015.
[35] Minister for Culture and Communication (n 29).
[36] Département Recherche, Etudes et Veille.
[37] Hadopi, 'Actualités [News]' (*Hadopi.fr*) (French) <http://www.hadopi.fr/en/actualites.html> accessed 22 December 2015.
[38] Hadopi, 'Resources' (*Hadopi.fr*) <http://www.hadopi.fr/en/resources> accessed 22 December 2015.

Works on the Internet'[39], which considered the financial implications of copyright infringement, and may have been instrumental in the French shift towards focusing on commercial piracy.

New Zealand

The New Zealand GR system was implemented in 2011, two years after the French system, via the passage of an Act[40] amending the Copyright Act 1994, and implementing provisions for a monitoring and GR system. It was also accompanied by a set of Regulations detailing the operation of the system.[41] In many ways, the New Zealand GR system is similar to the French system. It monitors P2P downloading,[42] and allows three strikes before ultimate penalties are imposed.[43] While the legislation dictated originally that disconnection was a possibility, this was challenged and amended so that suspension of service could only be applied for until a date set by the Order in Council, made by the Minister for Justice.[44] The New Zealand GR system also makes use of notice periods – users cannot receive two warnings within the 'quarantine period' (35 days),[45] perhaps under the assumption that the copyright infringer may not be the internet service subscriber, and thus it may take them some time to locate the copyright infringer and require them to cease their activities. One difference between the French and New Zealand systems is that where the French law refers to Internet Service Providers (ISPs), the New Zealand laws refer instead to Internet Protocol Address Providers (IPAPs), which are defined as follows:

> a person that operates a business that, other than as an incidental feature of its main business activities,—

---

[39] Hadopi, 'Access to Works on the Internet' (2013) <http://www.hadopi.fr/sites/default/files/HadopiAccesstoWorksontheInternet.pdf> accessed 22 December 2015.

[40] Copyright (Infringing File Sharing) Amendment Act 2011 (NZ).

[41] Copyright (Infringing File Sharing) Regulations 2011 SI 2011/252 (NZ).

[42] 'File sharing is where—(a) material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users; and(b) uploading and downloading may, but need not, occur at the same time' Copyright Act 1994 (NZ) (as amended) s 122A(1).

[43] The notices are defined as a detection notice, a warning notice, and an enforcement notice. Copyright Act 1994 (NZ) (as amended) ss 122D-F.

[44] Emily Agnew, 'Controversial Copyright (infringing file sharing) Amendment Bill passed into law' (*James & Wells*, 14 April 2011) <http://www.jaws.co.nz/about-us/media/article/controversial-copyright-infringing-file-sharing-amendment-bill-passed-into> accessed 22 December 2015; While this provision could be amended under the general review of the NZ Copyright Act originally due in 2013, review was suspended pending the conclusion of the TPP. Office of the Minister for Commerce, 'Delayed Review of the Copyright Act 1994' (2013) <http://www.mbie.govt.nz/info-services/business/intellectual-property/copyright/documents-and-images/cabinet-paper-delayed-review-copyright-act-1994.pdf> accessed 22 December 2012.

[45] Copyright Act 1994 (NZ) (as amended) s 122A(1).

> (a) offers the transmission, routing, and providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing; and
>
> (b) allocates IP addresses[46] to its account holders; and
>
> (c) charges its account holders for its services; and
>
> (d) is not primarily operated to cater for transient users[47]

This 'is intended to exclude universities, libraries, and businesses that provide Internet access to their members or employees, but are not in the nature of a traditional ISP.'[48]

Rebecca Giblin, in her paper 'On The (New) New Zealand Graduated Response Law (And Why It's Unlikely To Achieve Its Aims)'[49] pointed out several of the issues facing the New Zealand scheme. These are not unfamiliar issues – the monitoring of P2P downloads only does not necessarily reduce piracy, merely moving it to other channels;[50] the expiry of warnings means that users need only refrain from piracy until such time as their slate is wiped clean, so to speak, and then may continue as before;[51] and finally, the non-static nature of Internet Protocol (IP) addresses makes it difficult to ascertain whether infringing activities have been perpetrated by the same person.[52] Furthermore, dynamic IP addresses – IP addresses which are assigned as they are needed, meaning that an address may be used by multiple people consecutively, and also that a single person may have several IP addresses within a relatively short space of time – mean that it is difficult to detect multiple infringements from the same person, meaning that issuing strikes is more difficult than at first thought. The paper did state that the implementation of IPv6 (a different internet protocol – version 6: at that date version 4 was in use – which could lead to individuals having permanent IP addresses) may put an end to this last problem, but that there was as yet no concrete

---

[46] Internet Protocol (IP) addresses are a numerical identifier given to devices connected to a network and using the Internet Protocol for communication.
[47] Copyright Act 1994 (NZ) s 122A(1).
[48] Copyright (Infringing File Sharing) Amendment Bill 2010 No 119-1 (NZ), Explanatory note, General policy statement, 4.
[49] Rebecca Giblin, 'On the (New) New Zealand Graduated Response Law (and Why It's Unlikely to Achieve Its Aims)' (2012) 62(4) Telecommunications Journal of Australia 54.1.
[50] ibid 54.6
[51] ibid 54.6; this was highlighted in the Irish Eircom GR system, where a customer was issued a notice which did not correspond to his activities – rather, he had been assigned the same IP address at a different date. This resulted in a High Court case considering whether an IP address fell under data protection laws, *EMI Records (Ireland) Ltd and others v Eircom Ltd* [2010] IEHC 108.
[52] Giblin (n 49), 54.5

date for when the switch to IPv6 would be complete. Even in 2015, as America ran out of IPv4 addresses to assign, the switch to IPv6 was not yet complete.[53]

These difficulties are loopholes which individual users may utilise to exploit the weaknesses of the NZ GR system. The paper also pointed out a further loophole contained within the regulations, specifically regulation 4(6):

> [a]n IPAP may ignore, for the purposes of its obligations under section 122C of the Act, any IP addresses identified in a rights owner notice that are not IP addresses that the IPAP allocates, or allocated at the relevant time, and the IPAP is not required (despite section 122T(2)(a) of the Act) to retain any information relating to those IP addresses.[54]

There is a possibility that users could have IP addresses which were not issued by their internet service providers (it is possible to allocate IP addresses directly to organisations or individuals, such as in the Asia Pacific region, where IP addresses are issued by the APNIC organisation[55]). In a scenario such as this, the ISP avoids all liability, as they effectively fall outside the scope of the GR scheme.

The New Zealand GR system is not without its difficulties. Similarly to Hadopi, it seems to be a system which would only stop the casual pirate, as there are multiple ways for enthusiastic or determined copyright infringers to work around the system without incurring any penalties. Combined with the absence of disconnection as a penalty, New Zealand's GR system rather lacks teeth.

Despite this, it certainly seems to have had some effect, given that there were seventeen private piracy judgements issued by the Copyright Tribunal in 2013, with fines imposed ranging from NZ$ 255.97 to NZ$ 914.35.[56] The facts of these seventeen judgements, however, show that the majority of those cases which reached tribunal stage were being considered for downloading fewer than ten

---

[53] James Walker, 'North America has now run out of IPv4 Internet addresses' (*Digital Journal,* 2 July 2015) <http://www.digitaljournal.com/internet/north-america-has-now-run-out-of-ipv4-internet-addresses/article/437297#hv15558> accessed 22 December 2015.
[54] Copyright (Infringing File Sharing) Regulations 2011 (NZ) Reg 4(6).
[55] APNIC <http://www.apnic.net/> accessed 22 December 2015.
[56] Ministry of Justice, '2013 decisions' (*Copyright Tribunal*) <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions-1/2013-decisions> accessed 22 December 2015.

songs – generally not even a full album.[57] This certainly does not seem like the sort of determined pirate who poses an immense threat to film, TV, and music studios. The number of decisions declined sharply over time, with only four in 2014,[58] and a single decision in the first six months of 2015.[59] Furthermore, while the Act does not preclude publishers, the focus is certainly interpreted as being on the film and music industries. This author is currently unconvinced of the effectiveness of the New Zealand GR system. A lack of studies pointing out an increase in legitimate content consumption and purchase only, together with a lack of educational and redirection intiatives, serves to further support this viewpoint: that the NZ GR system is of dubious effect.

Canada

In Canada, a legislatively backed GR system takes a slightly different stance – their system is known as notice and notice. 2012 was a year of change for Canadian copyright. The Canadian government published their Copyright Modernization Act,[60] an Act amending the Copyright Act of Canada, which was shortly followed by no fewer than five Supreme Court decisions[61] on a single day relating to copyright.

The Copyright Modernization Act had eight stated aims, one of which was to

> clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright;[62]

The Act implemented this through the creation of a 'notice and notice' GR system.[63] This system differs slightly from those discussed above in that it does not place an onus on the ISP to apply mitigating measures to the subscriber, merely to pass on information. While it would seem from the title that 'notice and notice' would fit more snugly in the next chapter, which discusses notice

---

[57] The eighteenth Tribunal case was between Copyright Licensing Limited and the Universities of New Zealand. Given its different provenance, it will be disregarded for the purposes of this chapter's discussion.
[58] Ministry of Justice, '2014 decisions' (*Copyright Tribunal*) <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions-1/2014-decisions> accessed 22 December 2015.
[59] Ministry of Justice, '2015 Decisions' (*Copyright Tribunal*) <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions-1/2015-decisions> accessed 1 July 2015.
[60] Copyright Modernization Act SC 2012 c 20 (Canada).
[61] The date was July 12, 2012. *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada* - 2012 SCC 34; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada* - 2012 SCC 35; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada* - 2012 SCC 36; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)* - 2012 SCC 37; *Re:Sound v Motion Picture Theatre Associations of Canada* - 2012 SCC 38; Michel Geist, '*The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013).
[62] Copyright Modernization Act 2012 (Canada), Summary, b).
[63] Copyright Act RSC 1985 c C-42 (as Amended) (Canada) ss 41.25-41.26.

and takedown, the distinction is that notices are sent from the ISP to the downloader, similar to GR systems, whereas with notice and takedown, the notice is sent to the uploader.

Sections 41.25 and 41.26 of the Copyright Act,[64] as inserted by the Copyright Modernization Act, created this notice and notice system, which came into effect in January 2015.[65] Copyright owners may notify ISPs of a claimed infringement,[66] and the ISP is then required to send that infringement notice on to the internet subscriber[67] who is infringing. If they fail to do so, they may be required to pay statutory damages to the claimant of 'not less than C$5,000 and not more than C$10,000.'[68] A copyright owner is entitled to injunctive relief against the ISP.[69] The consumer who receives the notice must be informed that their internet connection was used to infringe on copyright, and given the date, time, location, and identification of the copyright material that was infringed.

Notice and notice is not a true graduated response system, in the sense discussed both supra and infra, as it does not carry with it penalties or escalating notices. Further, ISPs act as mere intermediaries to pass on notices from rights holders. However, it is worth noting in this section that the system does bear some similarities to other GR systems. ISPs are required to retain information on subscribers sent a notice for six or twelve months – this is in order to facilitate a disclosure order by the court, should the rights holder choose to take action against the subscriber. If this does occur, the subscriber may be liable for a penalty of up to C$5,000. This penalty is the maximum regardless of the number of infringements.

The Canadian notice and notice system has been subject to some abuse by rights holders, notably CEG-TEK and RightsCorp, American copyright enforcement companies which have been sending notices to Canadian internet users. Although the legislation set out the minimum standards which must be contained in a copyright notice – that is to say, the particulars of the offence, the claimant's name and address, and the copyright claim which the claimant holds over the work,[70] there is nothing to state that other information may not be contained in the notice. Thus, agencies may send notices which contain not only the information required by law, but also a demand for a financial settlement. There is also no provision for ISPs to refuse to pass on notices

---

[64] ibid ss 41.25-41.26.
[65] Office of Consumer Affairs, 'Notice and Notice Regime: Quick Facts' (*Industry Canada*) <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html> accessed 22 December 2015.
[66] Copyright Act (n 63) s 41.25(a).
[67] ibid s 41.26(1).
[68] ibid s 41.26(3).
[69] ibid s 41.27.
[70] ibid s 41.25(2)(a).

which are deliberately misleading about Canadian copyright law, as some of these notices are, stating that consumers may be liable for fines of up to $150,000 per infringement.[71] In actuality, the liability for non-commercial infringement is capped at C$5,000, regardless of the number of infringing downloads. Consumers who then respond to these claim give their details to agencies, leading to a tidy financial reward without the need for tiresome litigation.[72] Although the government department Industry Canada made it clear that there is no obligation to pay these settlement demands,[73] and the governmental pages explaining the notice and notice system do not mention settlement fees,[74] there was undoubtedly still a proportion of internet users who, struck by the fear of a legal notice, would settle immediately, rather than risk the possibility of massive fines.

Despite the implementation of the Copyright Modernization Act, and its attendant notice and notice system, the International Intellectual Property Alliance[75] had not seen fit to remove Canada from its Watch List[76] for its submission[77] to the United States Trade Representative in preparation for the 2014 Special 301 Report.[78] Given that Canada is home to several of the world's largest

---

[71] Michael Geist, 'Rightscorp and BMG Exploiting Copyright Notice-and-Notice System: Citing False Legal Information in Payment Demands' (*Michael Geist,* 8 January 2015) <http://www.michaelgeist.ca/2015/01/rightscorp-bmg-exploiting-copyright-notice-notice-system-citing-false-legal-information-payment-demands/> accessed 22 December 2015.

[72] Michael Geist, 'The Copyright Notice Flood: What to Consider If You Receive a Copyright Infringement Notification' (*Michael Geist,* 13 April 2015) <http://www.michaelgeist.ca/2015/04/the-copyright-notice-flood-what-to-consider-if-you-receive-a-copyright-infringement-notification/> accessed 22 December 2015.

[73] Megan Haynes, 'Canadians have "no obligation" to US piracy firm' (*Toronto Metro,* 22 April 2015) <http://metronews.ca/news/canada/1348052/canadians-under-no-obligation-to-pay-for-piracy/> accessed 22 December 2015.

[74] Government of Canada, 'Notice and Notice Regime' (2014) <http://news.gc.ca/web/article-en.do?nid=858069> accessed 22 December 2015.

[75] The International Intellectual Property Alliance (IIPA), somewhat of a misnomer, represents US copyright-based industries. It works to improve international protection and enforcement of copyright materials. Members of the IIPA include Association of American Publishers, BSA | The Software Alliance, Entertainment Software Association, Independent Film & Television Alliance, Motion Picture Association of America, National Music Publishers' Association, and Recording Industry Association of America; See International Intellectual Property Alliance, 'About' (*IIPA.com)* <http://www.iipa.com/aboutiipa.html> accessed 22 December 2015.

[76] The Special 301 Report categorises countries into three lists - Priority Foreign Countries, Priority Watch List, and Watch List. Canada was on the Watch List in 2013. In 2012 and 2011, it was on the Priority Watch List.

[77] International Intellectual Property Alliance, '2014 Special 301 Report' (2014).

[78] The Special 301 Report is an annual review of intellectual property protection and market access led by the United States Trade Representative. It is so-called because it is mandated by s 301 of the Trade Act 1974.

torrent sites[79] despite the provisions of the 2012 Act, this was not a particularly surprising recommendation. Further, in 2015, despite the implementation of the notice and notice system and accession to the WIPO Internet Treaties, Canada remained on the Watch List.[80]

Nonetheless, the notice and notice system, according to CEG-TEK, was vastly effective in its fledgling months – it stated in May of 2015 that the ISP Bell Canada had seen a 69.6% decrease in infringements, with smaller decreases also being reported by other ISPs.[81] While part of this may be due to the (unfounded) fear of massive settlement demands, there is also a likelihood that even notices which fall within the legislative frameworks and have a purely informational and educational purpose may also be responsible for the fall in piracy. The notice and notice system in Canada was, at first glance, a highly effective system in its first months of operation.

United States

Moving on from legislation-mandated GR schemes, voluntary GR schemes, such as those in place in the United States and Ireland certainly deserve consideration. These schemes are characterised by the fact that they are private agreements between rights holders and ISPs. The first two cases discussed here arose as a result of litigation (the US CAS and Irish Eircom system), while the third was the result of a judicial order (the Irish UPC system). The fourth, Australian, system was developed in order to avoid being subject to a legislative system. The rationale for the shift away from legislation-mandated GR systems is advantageous for ISPs, as they do not need to seek public input into the development of the systems, although they can if they wish (as was the case with the Australian code) and a voluntary agreement to implement a GR system can offset the need for a legislative system to be implemented. Further, as ISPs move away from mere conduits, especially

---

[79] IIPA (n 77) 103 'Canada is still the home to some of the world's most popular Internet sites dedicated to piracy, including torrentz.eu and kickass.to, which garnered rankings of third and second place, respectively, on one of the most widely accessed listings of the world's most popular illicit BitTorrent sites [...]' Rankings taken from 'Ernesto', 'Top 10 Most Popular Torrent Sites of 2014' (*TorrentFreak*, January 4, 2014) <http://torrentfreak.com/top-10-popular-torrent-sites-2014-140104/> accessed 13 October 2015. The same sites were also in the 2015 list of most popular sites, although there was a change of location for Kickass. 'Ernesto', 'Top 10 Most Popular Torrent Sites of 2015' (*TorrentFreak*, January 4, 2015) <http://torrentfreak.com/top-10-popular-torrent-sites-2015-150104/> accessed 13 October 2015.

[80] US Trade Representative, '2015 Special 301 Report' (2015), 66-7.

[81] 'Ernesto' '"Six Strikes" anti-piracy scheme is a sham, filmmakers say' (*TorrentFreak,* 13 May 2015) <https://torrentfreak.com/six-strikes-anti-piracy-scheme-is-a-sham-filmmaker-say-150513/> accessed 22 December 2015; PR Newswire, 'Six Strikes And You're (Not Even Close To) Out; Internet Security Task Force Calls for End of Copyright Alert System' (*PR Newswire,* 12 May 2015) <http://www.prnewswire.com/news-releases/six-strikes-and-youre-not-even-close-to-out-internet-security-task-force-calls-for-end-of-copyright-alert-system-300082007.html> accessed 22 December 2015.

in the US, they needed to develop a system which protects them from action as a cooperating entity. Thus, the development of a voluntary GR system is preferable in multiple ways.[82]

The US Copyright Alert System (CAS) is a voluntary agreement between participating ISPs[83] and rights holders[84] such as the Motion Picture Association of America and the Recording Industry Association of America. The scheme was a long time in development, with negotiations reportedly going on for up to three years before the framework was established in 2011.[85] Multiple delays followed until implementation was finally achieved in February of 2013.[86] The system was, and indeed still is, a 'six-strike' system. The framework for the CAS is contained within a Memorandum of Understanding (MoU) between the participating ISPs and rights holders, which has been published in its entirety on the website of the Centre for Copyright Information (CCI), the organisation which administrates the CAS.[87] The CAS is limited to only P2P file sharing, mirroring Hadopi and the NZ system.[88] The MoU sets out in detail the process by which ISPs will send notices to suspected infringers. The penalties are not as severe as in legislative-backed schemes, ranging from in-browser alerts through mandatory education courses to bandwidth throttling – that is to say, limiting the speed of the customer's internet connection.[89] There is no requirement for ISPs to suspend internet access. The CAS also makes use of quarantine periods,[90] but they are substantially less generous than the New Zealand scheme, at only seven days between notices.[91] The expiry date of notices is longer at twelve months,[92] compared to New Zealand's nine

---

[82] Annemarie Bridy, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (2010) 89 Oregon Law Review 81; Annemarie Bridy, 'Graduated Response American Style: "Six Strikes" Measured Against Five Norms' (2012) 23 Fordham Intellectual Property Media and Entertainment Law Journal 1; Mary LaFrance, 'Graduated Response by Industry Compact: Piercing the Black Box' (2012) 30 Cardozo Arts and Entertainment Law Journal 165.
[83] AT&T, Cablevision, Time Warner, Verizon, and Comcast.
[84] MPAA members Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox Film Corporation, Universal Studios, and Warner Brothers Entertainment, IFTA, RIAA members Universal Music Group, Warner Music Group, Sony Music Entertainment, and EMI Music, and A2IM.
[85] Bridy, GR American Style (n 82).
[86] Jill Lesser, 'Copyright Alert System Set to Begin' (*Center for Copyright Information*, 25 February 2013) <http://www.copyrightinformation.org/uncategorized/copyright-alert-system-set-to-begin> accessed 22 December 2015.
[87] Memorandum of Understanding, (*Center for Copyright Information,* 6 July 2011) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf> accessed 15 December 2015 (MoU).
[88] MoU (n 87) Preamble 1.
[89] MoU (n 87) s 4(G).
[90] They are referred to in the MoU (n 87) s 4(G) as 'grace periods'.
[91] MoU (n 87) s 4(G).
[92] MoU (n 87) s 4(G)(v).

months.[93] Of course, while the system is not backed by legislation, it is important to note that subscribers to a particular ISP's service are bound by the law of contracts to abide by the CAS, as it is included in the terms and conditions of the service contract for the relevant ISP.

Early reports from the Center for Copyright Information, the organisation which administrates the CAS, confirmed that 'each ISP has been processing notices and generating Alerts and the few consumers who had elected to challenge their Alerts had been able to file those challenges with the American Arbitration Association'.[94] It was not until May 2014 that the CAS published a report on the first phase of the scheme.[95] This report stated that the CAS had sent out more than 1.3 million alerts,[96] with only 3% proceeding to final mitigation stages.[97] However, roughly 30% of warnings were for a second or subsequent stage, showing a high proportion of repeat offenders.[98] It offered a breakdown of the levels of alerts sent, from educational to acknowledgement to mitigation stages, their review process, and the outcomes of those cases which were reviewed.[99] The review was optimistic about the possibility of 'mov[ing] the needle' of consumer behaviour away from content infringement to legitimate consumption methods.[100] This is perhaps not backed up by other research,[101] such as the statement of no decline of traffic to the Pirate Bay from the US.[102] It is still interesting to note that most alerts did not proceed to the final stages – but whether this is due to increased proxy[103] and VPN[104] use, thus changing the IP address of the computer and making it harder to detect, or decreased piracy is a difficult question to answer.

---

[93] Copyright (Infringing File Sharing) Amendment Act 2011 (NZ) s 122D(3).
[94] Jill Lesser, 'Early Reports: CAS Moving Forward' (*Center for Copyright Information)* <http://www.copyrightinformation.org/uncategorized/early-reports-cas-moving-forward/> accessed 22 December 2015.
[95] Center for Copyright Information 'The Copyright Alert System: Phase One and Beyond' (2014).
[96] ibid 4.
[97] ibid 2.
[98] ibid.
[99] ibid 8-11.
[100] ibid 12.
[101] 'Ernesto' '"Six Strikes" boosts demand for torrent VPNs and proxies' (*TorrentFreak,* 11 March 2013) <https://torrentfreak.com/six-strikes-boosts-demand-for-bittorrent-vpns-and-proxies-130311/> accessed 22 December 2015.
[102] 'Ernesto', 'Six-Strikes fails to halt US Pirate Bay growth' (*TorrentFreak*, 3 September 2013) <https://torrentfreak.com/six-strikes-fails-to-halt-u-s-pirate-bay-growth-130903/> accessed 22 December 2015.
[103] A proxy is an intermediary service which disguises where a request is coming from. Thus, a web proxy will disguise where a site request is coming from, and circumvent a block.
[104] A VPN (Virtual Private Network) is a method of connecting to a private network via the internet. Users connect to the VPN, which then connects to the internet, and can appear to be coming from a different place. Thus, a user connected to a VPN located in a non-US territory would not appear to be accessing monitored sites, as their IP address would indicate the location of the VPN, not the remotely connected device.

The CAS is notable in that it specifically aims to educate subscribers from the first steps – while the aim of Hadopi may have been to warn and deter consumers from infringing, the CAS specifically aims to educate users away from copyright infringement.[105] This is similar to the report about Hadopi which suggested that a decrease in infringement may have been attributable to the educational campaigns which accompanied the GR system.[106] In this context, a 70% drop-off between first and second stages can be seen as very positive. Nonetheless, the system is still subject to criticism. In May of 2015, the Internet Security Task Force, a coalition of small business holders, derided the effectiveness of a six strikes system and instead pointed to Canada's notice and notice system as more effective in tackling piracy.[107]

Ireland

Until 2015, the Irish voluntary GR system was unique in that the scheme was administered by a single ISP, Eircom, the country's largest ISP with 50% of market share in 2010.[108] It arose as a result of litigation[109] between Eircom and several record industry companies in 2009, seeking the blocking of illegal downloads by the installation of filtering technology. The case eventually settled out of court with an agreement to implement a private 'three strikes' scheme. Somewhat frustratingly, the precise terms of this particular agreement are confidential, but a relatively accurate idea of the operation of the system can be gleaned from the statement published by Eircom on their website in 2010 and a decision of the Irish High Court considering whether the settlement complied with relevant data protection legislation.[110]

For five years, the Eircom scheme was the only GR system in operation in Ireland, and thus avoiding it was relatively easy – simply requiring consumers to change to a different broadband provider. In 2015, however, three of the four companies involved in the original Eircom GR case successfully obtained an order[111] for a different GR system to be put in place with the country's

---

[105] MoU (n 87) Preamble 1.
[106] Hadopi (n 24).
[107] PR Newswire (n 81).
[108] Eircom rebranded in 2015 as Eir. For the purposes of clarity, this section continues to refer to Eircom, as this was the name of the ISP at the time of the litigation, and implementation of the GR system. Eircom, 'Introducing Eir: the changing face of Ireland's largest telecommunications company' (Press Release, 16 September 2015); Comreg, 'Quarterly Key Data Report, Q1 2010' (2010), 39.
[109] *EMI v Eircom* (n 51) [1]-[2].
[110] Eircom, 'Statement on Illegal File Sharing', Eircom (Press Release, 8 December 2010); *EMI v Eircom* (n 51).
[111] *Sony Music Entertainment (Ireland) Limited and others v UPC Communications Ireland Limited (No 1)* [2015] IEHC 317; *Sony Music Entertainment (Irl) Ltd and others v UPC Communications Irl Ltd (No 2)* [2015] IEHC 386.

second largest ISP, UPC Media.[112] This system differs from the Eircom system, and will be discussed infra.

The Eircom scheme operates in a manner similar to the three systems already discussed. Record companies are responsible for detecting infringing content. When it appears to be an IP address linked to Eircom, they notify Eircom, who will pass the allegation on to the subscriber.[113] It is a four strikes system, with a fourteen-day[114] quarantine period, falling between that of New Zealand and the US. The third strike, after a review of the evidence, will result in suspension of the customer's internet access for seven days.[115] A fourth strike will lead to twelve months' suspension.[116] Subscription fees are waived or refunded during these suspension periods.[117] The ability to suspend or terminate access is granted by virtue of a clause in Eircom's standard form subscriber contract.[118] The High Court indicated that there is an appeals process in which the subscriber may engage,[119] but this is not mentioned on the outline of the protocols on Eircom's own website, thus there was little clarity on how this would operate. The website merely stated that '[E]ircom will consider all customer appeals on a case by case basis.'[120]

Given that this agreement arose as a result of litigation solely against Eircom by EMI, Sony, Universal, and Warner Music, this limited its scope. Although the companies attempted to force similar obligations on other ISPs, Charleton J ruled in 2010 that there was no legal obligation for other ISPs to implement their own similar GR systems.[121] Furthermore, Eircom would not deal with any allegations of infringement from rights holders other than the parties to the original litigation.[122] The scheme saw some controversy in that it was subject to a review by the Data Protection Commissioner within six months of its implementation due to an improperly sent

---

[112] UPC rebranded as Virgin Media in late 2015. For the purposes of clarity, the company will continue to be referred to as UPC, similar to Eir/Eircom: Virgin Media Ireland, 'Virgin Media appoints Tony Hanway CEO of Ireland operations' (Press Release, 16 October 2015).
[113] *EMI v Eircom* (n 51), 9.
[114] *EMI v Eircom* (n 51), 13.
[115] Eircom, Statement on Illegal File Sharing (n 110).
[116] ibid.
[117] Eircom, 'Legal Music' (*Eir.ie*, 2012) <https://www.eir.ie/notification/legalmusic/faqs/> accessed 22 December 2015, q 8.
[118] *EMI v Eircom* (n 51) 14.
[119] ibid 13.
[120] Eircom, Legal Music (n 117) q 12.
[121] *EMI Records (Ireland) Ltd and others v UPC Communications Ireland Ltd* [2010] IEHC 377.
[122] Rebecca Giblin, 'Evaluating Graduated Response' (2014) 37 Columbia Journal of Law and the Arts 147, 173.

notification, and Eircom was ordered to cease the system.[123] Mr Justice Peter Charleton overturned an order issued by the Commissioner requiring Eircom to cease disconnecting customers,[124] and Charleton J's decision was upheld by the Supreme Court.[125]

Given the confidential nature of the original settlement, Eircom did not publicly make statistics available on the number of users affected by the scheme. According to the notes of a meeting between EMI Chief Executive Willie Kavanagh and Minister of State for Research and Innovation Seán Sherlock in December 2011, Eircom had issued almost 30,000 letters. Furthermore at that time, '100 customers had reached the fourth stage of losing their access for one week and 12 customers are at the stage where they will be permanently cut off by Eircom.'[126]

An Eircom report was issued in 2014 entitled 'Gradated Response – Music Industry Update' which gave some figures for disconnections and warning letters. Although the report itself is not available, or cannot be accessed by the author, some salient figures were included in the first case which established a GR system for UPC,[127] in 2015.

> It appeared from this report that 4,508 first letters had been sent out as at 20th May, 2014; 1,138 second letters had been sent out; 257 third letters had been sent out; 140 customers had been suspended; 49 had been reconnected and that so far no final letters of termination had been sent.[128]

The Eircom GR system, in its first years of operation, seemed to function relatively well in that it did not come up against any great obstacles, but equally it did not impose a huge number of sanctions. It is worth noting that in order to avoid the penalties associated with the system, customers needed only to change ISP, given that other ISPs had not been required to implement their own three strikes systems.[129] The waiving of subscription fees for internet suspension periods[130] created a situation where the consequences of a disconnection were minimal, other than

---

[123] Mary Carolan, 'Firms to continue "three strikes" rule against illegal music downloaders' (*The Irish Times,* 3 July 2013) <http://www.irishtimes.com/news/crime-and-law/firms-to-continue-three-strikes-rule-against-illegal-music-downloaders-1.1451820> accessed 22 December 2015.
[124] *EMI Records (Ireland) v The Data Protection Commissioner* [2012] IEHC 264, [14].
[125] *EMI Records (Ireland) v The Data Protection Commissioner* [2013] IESC 34.
[126] Éamonn Laird, 'Note of Minister Sherlock's meeting with the Irish Recorded Music Association on Monday 5th December 2011' (*Scribd,* Dec 7, 2011) <www.scribd.com/doc/83984745/EMI-Briefing-001> accessed 22 December 2015.
[127] *Sony v UPC (No 1)* (n 111) 57.
[128] ibid.
[129] *EMI v UPC* (n 121).
[130] Eircom, Legal Music (n 117) q 8.

perhaps the hassle of obtaining an alternative broadband or internet connection for the twelve months of disconnection even if the fourth step had been reached.

This changed somewhat in 2015, when, as mentioned, an order from the High Court imposed a requirement for a GR system on UPC, the second largest ISP in Ireland.[131] This system, however, worked differently to the Eircom system. Similar to the Canadian notice and notice scheme, the onus for final action was on the rights holder, not the ISP. Thus, while the first steps are the same for Eircom and UPC, whereby a rights holder will ask the ISP to send notices to the subscriber who held the infringing IP address, UPC is not expected to take the mitigating actions in later steps. It is expected to send the first two 'cease and desist' notices.[132] Following this, when UPC is asked to send a third notice to a subscriber, it will disclose the fact that this was a third notice to the rights holder.[133] The rights holder may then seek a *Norwich Pharmacal* injunction to disclose the details of the infringing subscriber, and use those details to seek further action against the infringer. This may include termination of their internet subscription, and UPC would not be permitted to oppose this action.[134] The order was made under the Copyright and Related Rights Act, 2000 (as amended).[135] This second version of an Irish GR system places fewer obligations on the ISP, as it will not be required to disconnect subscribers upon receipt of a certain number of notices, but instead to wait for further action from the rights holder. The GR system applies only to fixed broadband (therefore not mobile broadband) and will not apply to business (or presumably university/public/library) connections. The first judgement was given in March of 2015,[136] but adjourned to give the parties time to prepare a submission on how the order would be implemented.[137] The second judgement, in May of the same year,[138] affirmed that the order would proceed as outlined in the original judgement. It is set for review after five years.[139] Given that the order was not confidential, unlike the Eircom agreement, it will hopefully have more information

---

[131] As of Q2 2015, UPC had 29.0% of total broadband subscriptions, to Eircom's 35.3%. Comreg, 'Quarterly Key Data Report Data as of Q2 2015' (2015).
[132] *Sony v UPC (No 1)* (n 111) 198.
[133] ibid.
[134] ibid.
[135] Copyright and Related Rights Act 2000 (as amended) (Ireland) s 40(5a). This particular power to grant injunctions is discussed in Chapter 4 – it was implemented as part of the 'Irish SOPA' regulations.
[136] *Sony v UPC (No 1)* (n 111).
[137] Irish Times, 'UPC ordered to take action against illegal downloaders' (*The Irish Times*, 27 March 2015) <http://www.irishtimes.com/news/crime-and-law/courts/high-court/upc-ordered-to-take-action-against-illegal-downloaders-1.2156346> accessed 20 November 2015.
[138] *Sony v UPC (No 2)* (n 111).
[139] ibid 24.

available on numbers of cease and desist notices sent, and orders made, leading to a clearer analysis of the efficacy of the second Irish GR system.

The fact that both Irish GR systems were implemented in response to litigation means that warnings or cease and desist notices are only issued on certain content. A consumer could, for example, download the entire Disney back catalogue without any warnings or penalties from this system, as Disney was not party to the original litigation. Neither were a host of film, TV, music, publishing, or other creative companies, thus limiting the scope of both systems. The UPC system is more limited in application than Eircom, as EMI was a party to Eircom, but not UPC. While it is worth noting that the appellants in both scenarios are all large and influential companies with a wide variety of creative content, for the technologically-savvy or intelligent pirate, it is as simple as noting which studio has produced the film, show or song that they might wish to obtain, and selecting their download method accordingly – direct download or cyberlocker for those owned by EMI, Warner, Universal or Sony, and P2P for all others. Such limitations, while they may occasionally be irritating, are certainly not enough to deter the average determined teenager. The implementation of the second GR system, on the UPC network, however, makes it more difficult to avoid being subject to some form of GR entirely. UPC and Eircom together held a 64% market share of the Irish fixed broadband market in 2015.[140] The increased availability of GR, however, does not necessarily correlate to increased effectiveness, and neither Irish GR system focuses on educating consumers as to how and where to obtain legal content.

Ireland is unique not only in having two simultaneously operating GR systems, but also through their method of implementation (UPC is the only judicially-ordered GR system). Despite this innovative and different approaches to GR, it is still lacking the same crucial component that the NZ system is also – a concurrent educational campaign pointing consumers to legitimate content consumption.

Australia

Although Australia has had perhaps a different approach to copyright enforcement to other territory discussed here (especially with regard to ISP liability), when it comes to GR, they are similar to both the US and the UK. After a letter from the Minister for Communications requesting such a code,[141] in February 2015, a group of Australian ISPs released a draft code of

[140] As previously mentioned, Eircom had 35.3% of total broadband subscriptions, and UPC 29.0%, making a total 64.3% market share. Comreg (n 131).
[141] Malcolm Turnbull, 'Collaboration to Tackle Online Copyright Infringement' (Press Release, 10 December 2014).

practice[142] establishing a voluntary GR system.[143] Similar in practice to the UK and US systems, it suggested three stages – education, warning, and final, with a list of final warning customers maintained and available to rights holders on request[144] and a notice validity of 12 months – if a user did not progress from first to third notice within twelve months, they would revert to a null stage, and may begin again.[145] Customers could appeal their position on the list on payment of a fee, which was refundable in the event of success. The Code was subject to comment until March 2015, and received some criticism, including that it would incite consumers to breach copyright twice a year with no penalties,[146] or that the fee to appeal was a 'fine by stealth'.[147] Nonetheless, it progressed, with a final version submitted to the Australian Communications and Media Authority (ACMA) in April 2015.[148] It will apply to ISPs with more than 1,000 home broadband subscribers.[149] The scheme will apply only to fixed home broadband lines, not mobile internet or public internet connections, such as cafes or bars,[150] and rights holders must be certified and verified before notices will be sent.[151] The 12 month notice validity was retained.[152] Those customers who reach the final notice stage will be placed on a list, which is available to rights holders. Although it contains no identifying information, there is a possibility to seek a judicial order to reveal the information, similar to the Canadian and Irish UPC schemes.[153] The requirement to pay a fee for appeal was removed, except in the case of an excessive number of

---

[142] Communications Alliance, 'Industry Code C653:2015 Copyright Notice Scheme, Public Comment Version-20/2/15' <http://www.commsalliance.com.au/__data/assets/pdf_file/0005/47570/DR-C653-2015.pdf> accessed 22 December 2015 (Draft Code).
[143] Turnbull (n 141): The letter stated that such a code must be submitted to the Australian Communications and Media Authority by April 8, 2015. Failure to do so would have resulted in the Australian Government implementing its own code.
[144] Adrian Storrier, 'Graduated response in Australia: what does the draft code of practice say?' (*The IPKat,* 21 February 2015) <http://ipkitten.blogspot.co.uk/2015/02/graduated-response-in-australia-what.html> accessed 22 December 2015.
[145] Draft Code (n 142) s 3.6.2(f).
[146] Simon Sharwood, 'Australian ISPs agree to three-strikes-plus-court-order anti-piracy plan' (*The Register,* 20 February 2015) <http://www.theregister.co.uk/2015/02/20/australian_isps_agree_to_threestrikespluscourtorder_antipiracy_plan/> accessed 22 December 2015.
[147] ACCAN, 'Copyright notice scheme must respect consumer protections' (Press Release, 20 February 2015) <https://www.accan.org.au/news-items/media-releases/1019-copyright-notice-scheme-must-respect-consumer-protections> accessed 22 December 2015.
[148] Communications Alliance, 'Industry Code C653:2015 Copyright Notice Scheme' <www.commsalliance.com.au/__data/assets/pdf_file/0005/48551/C653-Copyright-Notice-Scheme-Industry-Code-FINAL.pdf> accessed 22 December 2015 (Final Code).
[149] Final Code (n 148) s 3.2.1(a).
[150] ibid s 1.3.3.
[151] ibid s 3.3.1.
[152] ibid s 3.6.5.
[153] ibid s 3.12.7.

challenges.[154] The Code included a provision for independent assessment eighteen months after commencement.[155] As of September 1 2015, the projected start date of the scheme, no response from ACMA on whether or not it would register the code or not was available.[156]

United Kingdom

Finally, to home territory, the UK. The first incarnation of a British GR system was envisaged by the Digital Economy Act 2010 (DEA).[157] This Act set out a framework for a GR system which was a variation on those seen before it. The DEA also created an obligation for the IPO to monitor infringement in the UK as part of the system. The Hargreaves Review recommended that this monitoring begin before the implementation of the GR system; by 2015 it was on its fifth wave. The first waves were funded by Ofcom, and supported by the IPO. The fifth wave, in 2015, marked the first time the IPO commissioned the research itself, from Kantar Media.[158] In July 2015 the IPO publicised its report on the content infringement and online content consumption behaviour of UK internet users aged 12+, which provided a variety of information about the demographics and behaviour of online content consumption, both legal and illegal. For books, it is interesting to note that 89% of those consuming content online did so 100% legally.[159] Also of note is that 40% of those surveyed registered a lack of confidence in whether or not the content they were consuming online was legal.[160] This uncertainty, which is in line with previous waves of the same research, may have been a prompt for the educational aspects of some GR systems.

As the GR system set out in the DEA has not yet come into effect, obviously its effects cannot be analysed. That is not a problem exclusive to the UK – other GR systems appear shrouded in mystery, meaning that it is difficult to assess how well any of them are operating. The framework set out in the DEA envisages a tiered scheme with two types of obligations: initial obligations and technical obligations. The initial obligations would require ISPs to pass notification to their subscribers of allegations of infringement made by rights holders, and also to maintain anonymised infringement lists. Rights holders may then seek a court order to disclose the details of infringers who have reached a threshold number of infringement reports relating to their copyright content.

---

[154] ibid s 3.10.3.
[155] ibid s 1.6.
[156] Rohan Pearce, 'Should the copyright notice scheme be scrapped?' (*ComputerWorld,* 8 September 2015) <http://computerworld.com.au/article/584018/should-copyright-notice-scheme-scrapped/> accessed 22 December 2015.
[157] Digital Economy Act 2010 (DEA).
[158] IPO, 'UK consumers give boost to legal downloading and streaming for TV, films and music' (Press Release, 22 July 2015).
[159] Kantar Media Monitoring (n 3) 19.
[160] ibid 44.

These obligations would be in accordance with the DEA and the procedures set out therein, as well as the 'Initial Obligations Code' (IOC), one of two secondary pieces of legislation designed to accompany the DEA.[161] The UK system does not place the onus for sanctions on the ISPs, similar to the Canadian, Australian and Irish UPC scenarios. It would require that ISPs assist rights holders in identifying repeat infringers and policing their customers and users.

A first and second infringement report would require the ISP to send a notification to the user that they may be placed on a copyright infringement list. If a third report was made within 12 months, the ISP would have to notify the account holder of both the allegation and the fact that they had been placed on the aforementioned list. The notification would also explain that the user's details were anonymised, but copyright holders may request a *Norwich Pharmacal* order to release the details, and then may be able to bring legal action against them. The UK system would also makes use of quarantine periods, this time a minimum of twenty days.[162] There would also be an appeals procedure, as mandated by the Act, which would allow appeals on the grounds of the allegedly infringing act not being an infringement of copyright, or the IP address not relating to the subscriber at the time of the infringement.[163]

The UK system also differs from the schemes mentioned above in that it is not exclusively restricted to P2P downloading,[164] although it is likely that this would be the focus. Furthermore, it would not be restricted to a particular type of copyright content (Hadopi, for example, related only to audio-visual content, and the Irish system only to content owned by the companies involved in the original litigation), but rather would restrict those who may enter the scheme to copyright owners who have 'made an estimate of the number of copyright infringement reports

---

[161] The second piece of secondary legislation is a Costs Order. The IOC dictates in detail the way the scheme will operate, where the Costs Order lays out the allocation of the scheme's costs. Ofcom was charged with formulating both of these. However, after a draft in 2010 (Ofcom, 'Online Infringement of Copyright and the Digital Economy Act 2010 Draft Initial Obligations Code' (2010) <http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/summary/condoc.pdf> accessed 22 December 2015) which led to a draft SI (The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2011) being found partially unlawful after judicial review (*British Telecommunications Plc and another, R (on the application of) v The Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin) (20 April 2011)), and a 2012 Costs Order (Ofcom, 'Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' (2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf> accessed 22 December 2015) never making it as far as Parliament, the DEA has been interminably delayed.
[162] Ofcom, 'Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' (n 161), Annex 3 ss 12, 13.
[163] DEA (n 157) s 13(3).
[164] Giblin (n 122) 167.

[they] will make to a qualifying internet service provider in that notification period',[165] and provided it to Ofcom and ISPs as set out in the IOC. These differences, especially with regard to download type, could be crucial.

However, it also suffers from some of the same weaknesses as the previous schemes. The scheme allows for at least a 20-day grace period,[166] and notices would expire 12 months after they were issued.[167] This means that entrepreneurial pirates could limit the duration or timing of their copyright infringing activities in order to avoid being on the receiving end of notices or penalties. The disclosure order is unlike the other legislative systems in New Zealand and France, but this is the same provision as the Irish, Australian, and Canadian schemes and is not onerous. In fact, the Irish order would be identical, as it comes from English precedent, the *Norwich Pharmacal* order.[168]

A final issue, although certainly the most pressing, is that interminable delays have beset the scheme since the Act received royal assent in 2010. The Act first required two supplementary pieces of legislation[169] to be formulated by communications regulator Ofcom. Ofcom placed draft versions of these documents, the IOC and the Costs Order, before the government by early 2011,[170] but they were delayed by two ISPs seeking judicial review.[171] Revised versions of the IOC[172] and Costs Order[173] were released in June 2012, with the expectation that they would be put before the UK Parliament by the end of 2012, but they were withdrawn.[174] This may be attributable to the controversies regarding the distribution of costs, which were the subject of the judicial review in

---

[165] Ofcom 'Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' (n 161) 18.
[166] ibid Annex 3 ss 12, 13.
[167] ibid 3.
[168] So-called because such an order was first issued in *Norwich Pharmacal Co and others v Customs and Excise Commissioners* [1974] AC 133.
[169] Communications Act 2003, ss 124D; 124E; 124M.
[170] See Draft Statutory Instrument: The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2011 (n 161); Ofcom, 'Online Infringement of Copyright and the Digital Economy Act 2010' (2010) (n 161).
[171] *British Telecommunications Plc v Secretary of State for Culture, Olympics, Media and Sport* [2012] EWCA Civ 232.
[172] Ofcom 'Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' (n 161).
[173] Ofcom, 'Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012' (2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/summary/condoc.pdf> accessed 22 December 2015.
[174] Peter Bradwell, 'Even more delays to the Digital Economy Act' (*Open Rights Group*, 4 February 2013) <https://www.openrightsgroup.org/blog/2013/even-more-delays-to-the-digital-economy-act> accessed 22 December 2015.

2011.[175] Opinion in 2013 suggested that DEA letters would not be operational until 2016,[176] six years after the Act received royal assent. This date has been pushed further and further back, and in the meantime, a voluntary scheme has arisen.

Early 2014 saw the leaking of information about a Voluntary Copyright Alert Programme (VCAP)[177] to the press. This was formally announced in July 2015 as Creative Content UK (CCUK).[178] This voluntary scheme between ISPs and industry bodies[179] is a two-pronged approach to increasing legitimate content consumption and decreasing online piracy. The first prong is an educational wave designed to increase awareness of legitimate content consumption methods, part-funded by government.[180] The second is a series of browser alerts, similar to that of the US CAS.[181] The announcement, which was made in July of 2014, stated that the browser alert system would begin 'at a later date' with the educational campaign in Spring 2015. It was not until July 2015 that the announcement was made that PR firm Weber Shandwick would lead this educational campaign.[182] There was no mention at the time of the browser alert system, but it can be assumed that it is still in the works – other firms are involved in advertising, and media planning. In October

---

[175] *R (BT) v SoS BIS* (n 161).
[176] James Firth, 'Sources: No Digital Economy Act Copyright Warning Letters until 2016 at the Earliest' (*Slightly Right of Centre*, 30 May 2013) <http://www.sroc.eu/2013/05/sources-no-digital-economy-act.html?m=1> accessed 22 December 2015.
[177] Darren Meale, 'BPI, MPA and ISPs go VCAP against P2P while DEA is still MIA' (*The IPKat,* 16 May 2014) <http://ipkitten.blogspot.co.uk/2014/05/bpi-mpa-and-isps-go-vcap-against-p2p.html> accessed 22 December 2015; Ben Challis, 'ISPs and content industries close to voluntary three strike scheme in the UK' (*The 1709 Blog,* 13 May 2014) <http://the1709blog.blogspot.co.uk/2014/05/isps-and-content-industries-close-to.html> accessed 22 December 2015; Dave Lee, 'Deal to combat piracy in UK with "alerts" is imminent' (*BBC News,* 9 May 2014) <http://www.bbc.co.uk/news/technology-27330150> accessed 22 December 2015.
[178] BPI, 'UK Creative Industries and ISPs partner in major new initiative to promote legal online entertainment' (Press Release, 19 July 2014).
[179] Participants at announcement included the Motion Picture Association (MPA), the BPI (British Recorded Music Industry), the four main internet service providers: BT, Sky Broadband, TalkTalk, and Virgin Media, the BBC, Equity, the Film Distributors' Association, ITV, the Independent Film & Television Alliance (IFTA), the Musicians' Union, Pact the Premier League, the Publishers Association and UK Music: BPI (n 178).
[180] HM Government, 'New education programme launched to combat online piracy' (Press Release, 19 July 2014).
[181] RT, 'UK internet firms to adopt new "anti-piracy" strategy' (*RT,* 22 July 2014) <http://www.rt.com/uk/174744-uk-internet-fileshare-piracy/> accessed 22 December 2015.
[182] Natalie Mortimer, 'Creative Content UK appoints Weber Shandwick to deliver education campaign' (*The Drum,* 15 July 2015) <http://www.thedrum.com/news/2015/07/15/creative-content-uk-appoints-weber-shandwick-deliver-education-campaign> accessed 22 December 2015; Mark Jackson, 'UK ISPs and Rights Holders to Begin Anti-Piracy Campaign' (*ISPreview,* 15 July 2015) <http://www.ispreview.co.uk/index.php/2015/07/uk-isps-and-copyright-holders-begin-internet-anti-piracy-campaign.html> accessed 22 December 2015.

2015 the educational prong launched a 40-second TV spot,[183] demonstrating the dangers of online piracy and directing consumers to a website[184] which would help them find legitimate content. It is worth noting that the advert spanned the spectrum of creative content – music, film, TV, books, and games are all represented in the 40 seconds.[185]

Even before the CCUK browser alter scheme came into effect, it was subject to criticism.[186] It appears that once again, only P2P networks will be monitored, a weakness common to all the active GR systems discussed, and unlike the DEA. Further, one can assume that the DEA's long-awaited implementation will, at the very least, depend on the effectiveness of the CCUK campaign,[187] and may never reach fruition. Certainly the CCUK campaign is not universally well-received.[188] Nonetheless, as the IPO research mentioned earlier showed,[189] almost half of consumers are unsure about whether or not the content they are downloading is legal – educational campaigns such as the CCUK campaign can help to eliminate this uncertainty. Further, the CAS and Hadopi both cited educational benefits to their campaign. Thus, the first part of the CCUK initiative may well prove the more crucial in terms of tackling online infringement.

Analysis

The efficacy of GR systems is difficult to analyse, as the aims are difficult to pinpoint. If the aim of a GR system is solely to reduce P2P downloading, then certainly it would be relatively easy to establish whether or not a system is effective. However, a migration to other forms of copyright infringement, such as downloading via cyberlockers or direct download sites, is presumably not the type of change which would please a copyright owner.

---

[183] The Drum, 'Ad for Creative Content UK' (*YouTube.com,* 23 October 2015) https://www.youtube.com/watch?v=DWWAFM284Yk accessed 15 December 2015.
[184] Get It Right From A Genuine Site <https://www.getitrightfromagenuinesite.org/> accessed 15 December 2015.
[185] Tony Connelly, 'Creative Content UK launch new ad campaign highlighting the consequences of illegally downloading content' (*The Drum,* 23 October 2015) <http://www.thedrum.com/news/2015/10/23/creative-content-uk-launch-new-ad-campaign-highlighting-consequences-illegally> accessed 15 December 2015.
[186] Sophie Curtis, 'Illegal downloading: four strikes and then... nothing' (*The Telegraph,* 21 July 2014) <http://www.telegraph.co.uk/technology/news/10979918/Illegal-downloading-four-strikes-and-then...-nothing.html> accessed 22 December 2015.
[187] The leaked VCAP Memorandum of Understanding stated that it would run for three years, so it is not outside the bounds of possibility that CCUK would have a similar assessment period.
[188] Timothy Geigner, 'Come See How Excited Everyone Is For The Latest UK Educational "Don't Pirate" Campaign' (*Techdirt,* 16 July 2015) <https://www.techdirt.com/articles/20150715/10465831650/come-see-how-excited-everyone-is-latest-uk-educational-dont-pirate-campaign.shtml> accessed 22 December 2015.
[189] Kantar Media Monitoring (n 3).

The success of a GR system may perhaps be measured by the number of successful cases resulting in a penalty to an internet user. In the first year of the New Zealand system, then, this would be seventeen tribunal decisions, with a combined monetary value of less than NZ$10,000,[190] most of which was costs awarded against the infringing consumers. Certainly for a country with a population of 4.5 million, and creative industries which contribute 2.1% of New Zealand's GDP,[191] this is by comparison a minuscule figure. Similarly, in the first four years of operation of Hadopi, a single internet suspension and four successful prosecutions[192] is not exactly a resounding success.

Alternatively, a possible measure of success would be the number of first or second warnings which did not result in further warnings, which would seem to indicate that the copyright infringer had been motivated to obtain their copyright material through legal channels. However, it is difficult, if not impossible, to assess whether an infringer made the decision to obtain the content through other, illegal, channels, through legitimate channels, or merely decided not to obtain such content.

While multiple jurisdictions have implemented GR systems, assessing their efficacy is difficult, and working around them can often be as simple as changing download method, as is the case in France and New Zealand, or changing internet service provider, as would be effective in Ireland and the United States. While the UK GR [DEA] system avoids some of these issues – it applies to most ISPs (although not those that offer 400,000 or fewer broadband-enabled lines),[193] and it applies to more than just P2P downloading, it is greatly hampered by the fact that it has yet to be implemented, and does not look likely to achieve implementation for some time to come.

Assessing GR systems which focus on education is even more difficult, as there are no concrete figures of disconnections or fines to be used. The figures released by the US CAS on its first year show that a substantial numbers of alerts were sent, but cannot analyse why or how further alerts were not required – whether through alternative or decreased piracy. Further, the fact that the enforcement prong of the UK's CCUK campaign had not been launched, even twelve months after its first announcement, presents another issue to overcome. Analysing and evaluating GR is no easy job.

---

[190] The sum of the seventeen tribunal decisions was $8685.84. Arithmetic done by the author. 2013 decisions (n 56).
[191] Ministry for Culture and Heritage (NZ), 'Cultural sector overviews' (*Ministry for Culture and Heritage,* 18 October 2013) <http://www.mch.govt.nz/what-we-do/cultural-sector-overviews> accessed 22 December 2015.
[192] Challis, Hadopi Failure (n 21).
[193] Ofcom, 'Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' (n 161) 3.

Rebecca Giblin, in her paper Evaluating Graduated Response,[194] made an excellent attempt at analysing the effectiveness of GR systems globally by asking three questions of each regime by country:

> 1. To what extent does graduated response reduce infringement?
>
> 2. To what extent does graduated response maximi[s]e authori[s]ed uses?
>
> 3. To what extent does graduated response promote learning and culture by encouraging the creation and dissemination of a wide variety of creative materials?[195]

Her analysis was comprehensive, and it would be pointless to repeat what has already been expertly implemented. Giblin's conclusions are largely similar to this author's. There is a dearth of evidence to suggest that GR in any way reduces infringement, increases authorised uses, or promotes learning and culture. While there are many advocates of GR, there appears to be little, if any, evidence which supports claims that GR has any real effect on the prevalence of copyright piracy. Copyright theft is certainly a pressing issue for many rights holders, but GR does not seem to be the most effective way to combat this.[196] However, the later examples of GR systems, with their greater focus on educational and mitigation efforts, seem to have learned from their predecessors. While the Hadopi and New Zealand examples do not offer encouragement in terms of concrete prosecutions or fines, the movement towards more educational initiatives[197] may prove to nudge consumers toward legitimate avenues of content consumption – iTunes and Spotify, Netflix and other subscription streaming services have never been more popular, with users numbering in the millions.[198] The Kantar research from the IPO emphasised that consumers have trouble with

---

[194] Giblin (n 122).
[195] ibid 180.
[196] See generally Giblin (n 122) 205-208.
[197] Such as the CAS in general and the CCUK advert: The Drum (n 183).
[198] Spotify had 60 million subscribers as of 2014: Stuart Dredge, 'Spotify financial results show struggle to make streaming music viable' (*The Guardian,* 11 May 2015) <http://www.theguardian.com/technology/2015/may/11/spotify-financial-results-streaming-music-profitable> accessed 16 October 2015; Netflix had 62 million members in mid-2015: Netflix, 'Netflix to Announce Second-Quarter 2015 Financial Results' (Press Release, 12 June 2015).

telling if content is legitimate or not,[199] but initiatives such as Get It Right[200] and The Content Map[201] have been developed to mitigate these difficulties.

A chronological timeline of the development of GR systems paints a picture, however, of an encouraging development and understanding of what is necessary in order to reduce copyright infringement. From the original punitive three strikes systems visible in Hadopi and the New Zealand systems to the more sophisticated educational systems visible in the CAS and CCUK plan, an increased emphasis on education and pointing consumers toward legitimate avenues of content consumption is an encouraging development. As indicated by several research studies, pirates are not all heartless content thieves with no intention of supporting creativity – quite the opposite, in fact. Copyright pirates exist on a bell curve. Content consumers are not divided strictly into the pirates and the honest purchasers – the majority of pirates are both.[202] A 2011 survey in America indicated that 46% of the self-admitted pirates stated that they did so less since the availability of streaming services[203] and the 2012 wave of the Ofcom media monitoring found that the most prolific pirates spent three times as much money annually on legitimate content than those who did not pirate at all.[204] Thus, improving the availability of digital content through legitimate means and educating would-be pirates as to the consequences of infringement and the avenues through which legitimate content is available may well be an effective strategy for reducing online content infringement.[205]

---

[199] Kantar Media Monitoring (n 3) 5.
[200] Get It Right From A Genuine Site (n 184).
[201] The Content Map is a site which directs consumers to legitimate avenues of content consumption, much like the Get it Right site (n 184). The Content Map <http://www.thecontentmap.com/> accessed 15 December 2015.
[202] Joe Cox and Alan Collins, 'Sailing in the same ship? Differences in factors motivating piracy of music and movie content' (2014) 50 Journal of Behavioral and Experimental Economics 70; Adrian Adermon and Che-Yuan Liang, 'Piracy and music sales: The effects of an anti-piracy law' (2014) 105 Journal of Economic Behavior and Organization 90; Hasshi Sudler, 'Effectiveness of anti-piracy technology: Finding appropriate solutions for evolving online piracy' (2013) 56 Business Horizons 149.
[203] Joe Karaganis, 'Copyright Infringement and Enforcement in the US' (2011) (American Assembly, Columbia University) <http://piracy.americanassembly.org/wp-content/uploads/2011/11/AA-Research-Note-Infringement-and-Enforcement-November-2011.pdf> accessed 25 November 2015.
[204] Kantar Media Monitoring, 'OCI Tracker Benchmark Study 'Deep Dive' Analysis Report' (2013) <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/deep-dive.pdf> accessed 25 November 2015; 'Andy', '"Worst" File-Sharing Pirates Spend 300% More On Content than "Honest" Consumers' (*TorrentFreak,* May 10, 2013) <https://torrentfreak.com/0-more-on-content-than-honest-consumers-130510/> accessed 25 November 2015.
[205] Joe Cox, 'Online Pirates May Be Willing to Pay – If the Price is Right' (*The Conversation,* 13 September 2013) <https://theconversation.com/online-pirates-may-be-willing-to-pay-if-the-price-is-right-18167> accessed 25 November 2015.

Chapter 4: A Legal Investigation of Copyright: Blocking Initiatives

Introduction

As discussed in the previous chapter, GR systems, in the beginning, focused on deterring the consumer from downloading illegal content, through the use of escalating penalties, and later through the use of educational redirection. However, there are other methods of enforcing copyright which focus not on the end user, the consumer of the illegal content, but on those who are providing access to illegitimate content. This chapter will consider the twin measures of notice and takedown and blocking injunctions. Notice and takedown is a term used to describe a variety of actions which require the removal of copyright infringing material from online locations. At its most basic, notice and takedown consists of a notice sent by a copyright holder to an infringing online host, requesting the takedown of the infringing content. This legal notice is then complied with by the host, and further action is not required, as the content is no longer available. While notice and takedown is an effective system, it is labour intensive, and requires the consistent monitoring of websites to locate infringing content and send the relevant notices, but it remains a popular method of enforcing copyright, with millions of notices sent monthly.[1]

Notice and takedown is complemented by the larger-scale action of blocking access to those websites which persistently infringe copyright, whether through the breadth of content, depth of use, or simply refusal to remove infringing content. While GR can be framed as both a deterrent and a penalty against copyright theft, the solely deterrent method of blocking websites has been gaining traction in the last few years. This is generally achieved by way of an injunction obtained through the courts. This differs from the earlier discussion of voluntary systems, such as the CAS and CCUK;[2] an injunction is required to force ISPs to block access to any infringing websites and ISPs do not voluntarily comply (although they often do not argue).[3] Similar provisions for ISPs can be seen in multiple different territories, including the UK, where the High Court in 2012 granted its first injunction against an ISP (British Telecom) under Section 97A of the CDPA,[4] and Ireland,

---

[1] The Lumen Project, a database of takedown notices, receives approximately three thousand notices a day. It was, until November 2015, known as Chilling Effects. Lumen Team, 'Chilling Effects Announces New Name, International Partnerships' (*Lumen Blog,* 2 November 2015) <https://lumendatabase.org/blog_entries/763> accessed 16 December 2015.

[2] See Chapter 3.

[3] The power to grant such injunctions is found in Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive) Art 8(3).

[4] *Twentieth Century Fox and others v Newzbin Ltd* [2010] EWHC 608 (*Newzbin1).*

which ordered six leading Irish ISPs to block access to The Pirate Bay in June 2013.[5] In contrast to this, was the Australian decision in *iiNet*[6] in 2012, which was a decision substantially more favourable towards ISPs. This was entirely reversed, however, by legislation in 2015.[7] Blocking injunctions are a measure that have experienced controversy regarding their implementation, and certainly stimulate debate. The second half of this chapter discusses blocking legislation in the UK, the controversy regarding implementing blocking injunctions in Ireland, the greater controversy regarding the attempt to create a power for blocking injunctions in the US, and finally the rapid change of opinion in Australia.

Notice and Takedown

Notice and takedown is the term used to refer to different systems across Europe and the US by which copyright owners can compel online entities to take down copyright infringing materials in response to a notification. The cooperation with the notice, and removal of offending material, then grants to the online service provider an immunity against further legal action or measures, known as a 'safe harbour'. The use of notice and takedown procedures is one of the most prolific and effective ways of dealing with copyright piracy, with Google receiving over 54 million takedown requests per month.[8] In the UK, and indeed across Europe, notice and takedown is legislated for by the European E-Commerce Directive, which was adopted in 2000.[9] Article 14 of the Directive sets out provisions for a system which grants 'safe harbour' from litigation to online hosts which comply with its provisions.[10] The Directive does not set out specific instructions for how a notice and takedown system will operate, instead allowing member states the freedom to create and administer their own notice and takedown systems as they see fit. What guidance the Directive does give is that where an online host has 'actual knowledge' of copyright infringement, they must act expeditiously to remove the content or disable access to it.[11] The Directive also

---

[5] *EMI Records (Ireland) Ltd and others v UPC Communications Ireland Limited and others* [2013] IEHC 274.
[6] *Roadshow Films Pty and others v iiNet Ltd* [2012] HCA 16.
[7] Copyright Amendment (Online Infringement) Act 2015 (Australia).
[8] Google Transparency Report, 'Requests to remove content: Due to copyright' <http://www.google.com/transparencyreport/removals/copyright/> accessed 21 September 2015, <https://www.dropbox.com/s/fmqq01t7gr6m86u/Screenshot%202015-09-21%2014.41.15.png?dl=0> accessed 21 January 2016.
[9] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive).
[10] Specifically, on becoming aware of illegal activity or information, it must act 'expeditiously to remove or disable access to the information': E-Commerce Directive (n 9) Art 14(b).
[11] ibid.

encourages the development of voluntary agreements between consumer agencies and trade associations to stimulate the development of efficient systems.[12]

In the US, a similar scenario is created by virtue of the Digital Millennium Copyright Act 1998 (DMCA).[13] The DMCA passed the Online Copyright Infringement Liability Limitation Act (OCILLA) 1998,[14] which creates a safe harbour for Online Service Providers (OSPs) (which includes ISPs and other online intermediaries), shielding them from copyright liability provided that they follow certain rules. This safe harbour provision includes the American notice and takedown system. Following the procedures set out in OCILLA, copyright holders may send a takedown notice to OSPs where their content is infringed through the direction of a user (eg a post to a message board, upload to YouTube, or a search engine result).[15] The service provider will then take down the link to the content and notify the uploader that their content has been removed. The uploader may, if they wish, then send a counter notice, in response to which the complainant has fifteen days to bring judicial proceedings. If this does not happen, the content will be released. In order to retain their immunity from litigation, OSPs are required to put in place a system which deals with 'repeat offenders' with regard to copyright infringement. This may range from Google removing certain websites from their search results to an online forum banning a user who persistently posts copyright material – the circumstances can be varied and diverse.

For content owners in the UK, the use of the system on a solo basis may be difficult – while they could set up Google Alerts[16] for their content, it is possible that they would seek legal advice before sending notices, adding extra costs, and the sending of notices is time-consuming, as it requires the content owner to seek the details of the website owner. Some content owners use monitoring agencies in protecting their copyright. When looking at the results of Google's transparency report, one can see that several monitoring agencies submit takedown requests on behalf of those they represent – MarkMonitor,[17] Remove Your Media LLC,[18] and Takedown Piracy LLC,[19] as well as industry bodies such as the Recording Industry Association of America (RIAA), the BPI

[12] ibid Recital 40.
[13] Digital Millennium Copyright Act 1998, Pub L 105–304 (US).
[14] ibid.
[15] Digital Millennium Copyright Act 1998, 17 USC § 512(c).
[16] Google Alerts is a system which monitors Google search results for specific keywords – an author could monitor their name, the title of their book, the name of the book series, etc. The system will then send notifications to the Alerts user, directing them to the search results which display their keywords. Google Alerts <https://www.google.co.uk/alerts> accessed 16 December 2015.
[17] MarkMonitor <https://www.markmonitor.com/> accessed 23 September 2015.
[18] Remove Your Media <http://www.removeyourmedia.com/> accessed 23 September 2015.
[19] Takedown Piracy <http://takedownpiracy.com/> accessed 23 September 2015.

(British Recorded Music Industry), and the Publishers Association (PA). While some agencies cover a multitude of content types (eg MarkMonitor), others are more specialised, and focus on a particular content type (eg Remove Your Media focuses on film). When considering industry bodies, they tend to focus on only a single content type, due to their nature as industry bodies – for example, the RIAA focuses on recorded music, whereas the PA focuses on print media – books, magazines, journals etc.

Many of these monitoring systems are commercial agencies, and thus difficult or expensive to gain access to. The PA, which represents book and journal publishers across the UK, maintains a database, the 'Copyright Infringement Portal',[20] which can be used as an example of the effectiveness of notice and takedown. Access to the Portal is free for all members of the PA, and available to others on a subscription basis.[21] The Portal, which was established in 2009, as eBooks were on the cusp of becoming an industry standard,[22] sent over three million takedown notices in the time from establishment to end of research period.[23] The Portal allows publishers to share the load of monitoring content infringement, creating an effective way of dealing with notice and takedown procedures. Over the years, the Portal has become a fully-fledged notice and takedown system with monitoring capabilities, which will send multiple notices with the correct legal requirements – eg referencing European or US law as relevant – in an automated system which reduces the need for small and medium businesses to engage the services of a solicitor to protect their copyright.

The Copyright Infringement Portal originally came into existence as a method of sharing notice templates, with reference to the correct legislative provisions. Over the years it developed, with a major redesign and relaunch in mid-2015. The Portal monitors the top infringing sites – those deemed to be severely infringing due to depth or breadth of content – and creates a system where individual PA members and Portal subscribers can then use this monitored database to search for

---

[20] Copyright Infringement Portal <http://copyrightinfringementportal.com> accessed 19 December 2015.
[21] Publishers Association, 'What does the CIP do?' (*The Publishers Association)* <http://www.publishers.org.uk/services-and-statistics/copyright-infringement-portal/what-does-the-cip-do/> accessed 14 January 2016.
[22] Amazon's Kindle was launched first in 2007, and the Apple iPad first in 2010 – these devices brought eBooks to the forefront and made them a more mainstream content type. Jacob Kastrenekes, 'The iPad's 5th anniversary: a timeline of Apple's category-defining tablet' (*The Verge,* 3 April 2015) <http://www.theverge.com/2015/4/3/8339599/apple-ipad-five-years-old-timeline-photos-videos> accessed 16 December 2015; Kyle Wagner, 'The History of Amazon's Kindle So Far' (*Gizmodo,* 28 September 2011) <http://gizmodo.com/5844662/the-history-of-amazons-kindle-so-far/> accessed 16 December 2015.
[23] Claire Anker, 'Meeting the Infringement Challenge' (*BookBrunch*, 4 November 2015) <http://www.bookbrunch.co.uk/article_free.asp?pid=meeting_the_infringement_challenge> accessed 19 November 2015.

their titles. The database uses text matching to match authors, titles, or ISBNs, and returns a list of links to possible infringing sites. The content owner can then check these sites, and use the Portal to send a copyright notice if necessary – thus simplifying the process of sending notices, as the Portal already has the relevant details for each repeat infringing site. Furthermore, the Portal aggregates infringement data at a higher level, which then informs further actions, such as the blocking injunction action brought by the PA which is discussed later in this chapter.[24]

Notice and takedown is a system which has resulted in large amounts of copyright material being protected – Google's transparency report, which lists both the number and nature of takedown requests they receive, is regularly updated, and shows the huge growth of takedown requests over the course of the years 2009-2015. It also gives detailed data on each reporting organisation. Using the PA as an example, we can see that since July 2011, which is when Google's transparency report data begins, the PA has requested the removal of over 1.5 million URLs, through almost 11,000 requests, with an average of 54 requests per week.[25] The transparency data also lists the top five domains from which the content is requested for removal. Two of these domains[26] were the subject of a blocking injunction action discussed later in the chapter. These figures represent only requests submitted to Google through their online form, relating to search results, and not other Google services such as YouTube or Blogger – but one can see from the scale of the numbers involved that notice and takedown is a system which is functioning well, and growing also. If, as mentioned, the PA sent 3 million notices, and 1.5 million of those were to Google, the other 1.5 million must have been to other website providers. As a system which allows the continued operation of the online world without the need for litigation, notice and takedown is highly effective – large companies such as Google are quick to respond to takedown requests, while other OSPs which do not cooperate can then be targeted for further action.

This is, of course, not to say that notice and takedown does not have its weaknesses and failings – both the DMCA and the European system have their weaknesses, including the fallibility of

[24] Conversation between author and Publishers Association Digital Infringement Manager, Claire Anker, 2 September 2015 3pm.
[25] Google Transparency Report, 'Reporting Organization: The Publishers Association' <http://www.google.com/transparencyreport/removals/copyright/reporters/141/The-Publishers-Association/> accessed 14 November 2015.
[26] Ebookee and bookfi.

automated notice sending[27] – the reason why printers have been subject to DMCA notices.[28] The systems are open to abuse in multiple ways – including, inter alia, sending notices where the notice sender is not the copyright holder,[29] or where the use of the work is legitimate under fair use or other exceptions, sending multiple notices rather than following the correct procedures,[30] and sending notices to take down works where the notice sender is the subject of the work, not the copyright holder.[31] There are, however, some measures in place to prevent some of these abuses. In 2001 Chilling Effects,[32] a joint project of several US law schools, including Harvard, Stanford, Berkeley, and the Electronic Frontier Foundation, was established as a database which analyses copyright removal requests, with the aim of studying the potential 'chilling effect' of those notices on free speech. It rebranded in 2015 as Lumen Database.[33] Lumen is used by major OSPs, including Google, Twitter, and reddit, to list their takedown requests and analyse them for abuse.[34] Further, in 2006, an independent third party analysis of the frequency of improper and invalid takedown submissions was conducted.[35] This paper listed some of the weaknesses of the DMCA, and made suggestions for reforms which might help to curb abuses in the system. These included changing the time of takedown until after the alleged infringer has had a chance to respond, and strengthening the remedies for abuse.[36] Although the report made some conclusions about the proportions of improper takedown notices, it is worth noting that the data related to the first

---

[27] Automated notifications could in themselves be an abuse of the system, given that the DMCA requires a 'good faith belief', and computers are not capable of beliefs or faith. Digital Millennium Copyright Act 1998, 17 USC § 512 (c)(3)(A)(v).

[28] Michael Piatek, Tadayoshi Kohno, Arvind Krishnamurthy, 'Challenges and Directions for Monitoring P2P File Sharing Networks - or - Why My Printer Received a DMCA Takedown Notice' (HotSec Conference, San Jose, 29 July 2008) <http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf> accessed 23 September 2015.

[29] Electronic Frontiers Foundation, 'Takedown Hall of Shame: News Agency With Dubious Copyright Claim Threatens Removal' (*Electronic Frontier Foundation*, 2011) <https://www.eff.org/takedowns/news-agency-dubious-copyright-claim-threatens-removal> accessed 16 December 2015.

[30] If a notice is appealed, then the notice sender's next course of action should be to file a lawsuit. However, notices which are appealed may simply be ignored, and a second notice sent to take down the relevant content, rather than resorting to litigation. This is an abuse of the system.

[31] Jeffrey Cobia, 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process' (2009-10) 10(1) Minn JL Sci and Tech 387.

[32] Lumen Database <https://lumendatabase.org/> accessed 23 September 2015.

[33] Lumen Team (n 1).

[34] See, for example, David F Gallagher, 'New Economy; A copyright dispute with the Church of Scientology is forcing Google to do some creative linking' (*The New York Times,* 22 April 2002) <http://www.nytimes.com/2002/04/22/business/new-economy-copyright-dispute-with-church-scientology-forcing-google-some.html?src=pm&_r=0> accessed 16 December 2015.

[35] Jennifer M Urban and Laura Quilter, 'Efficient Process or "Chilling Effects"? Takedown notices under section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara Computer and High Tech LJ 621.

[36] ibid 688-692.

years of operation of the Chilling Effects/Lumen database (2002-2005), and the numbers concerned were far lower than in 2015 – hundreds of notices per year, rather than the hundreds of millions in 2013 and 2014. Thus, the evolution of the DMCA processes required further assessment.

This further analysis can be seen in the 2013 paper Clickonomics,[37] which stated that notice and takedown measures were not 100% effective – in fact, sending takedown notices could result in a cat and mouse game between content owner and uploader, with the content owner required to seek out ever more incarnations of file hosting sites in order to send takedown notices. The paper suggested instead that a more effective method of curbing piracy would be to curb the financial incentives which are attached to it – the 'follow the money' approach which was advocated and adopted more in the 2010s and is discussed later in this thesis.[38]

Although notice and takedown is not a perfect solution, and focuses only on single files being taken down, it has been successful in removing millions of infringing files every month and continues to be a tool in the arsenal of rights holders as they protect their content. Research has shown that takedown does result in a decrease in the availability of files, even if this effect is only temporary.[39] Furthermore, the monitoring of notorious, prolific, or non-cooperative sites for the frequency and variety of content, or a refusal to engage with takedown procedures then informs the second copyright enforcement measure discussed next in this chapter – that of blocking injunctions.

Blocking Injunctions

United Kingdom

In the United Kingdom, there is a general statutory power to issue inunctions, which could be used to prevent copyright infringement where it is 'just and convenient' to do so.[40] However, in 2003, as a part of implementing the InfoSoc Directive,[41] a specific new section was inserted into the CDPA[42] creating the power to issue an injunction against a service provider 'where that service provider has actual knowledge of another person using their service to infringe copyright'.[43] This

[37] Tobias Lauinger and others, 'Clickonomics: Determining the Effect of Anti-Piracy Measures for One-Click Hosting' (Network and Distributed System Security Symposium, San Diego, 24-27 February 2013).
[38] See Chapter 7.
[39] Lauinger and others (n 37) sIV(a).
[40] Supreme Court Act 1981 s 37(1).
[41] InfoSoc Directive (n 3) Art 8(3).
[42] This section was inserted by the Copyright and Related Rights Regulations 2003 SI 2003/2498, s 27.
[43] Copyright, Designs and Patents Act 1988 (as amended) s 97A(1) (CDPA).

provision remained unused until 2011, when it had its first outing, in *Newzbin2*.[44] In *Newzbin1*[45] six film studios sought an injunction against Newzbin Limited, a website which operated on Usenet[46] (an online discussion system). The claimants asserted that the operation of the site allowed users to access copyright materials in a matter of clicks, and that this was the focus of Newzbin. Newzbin asserted that it was content agnostic – that it neither encouraged nor discouraged piracy.[47] This case resulted in an injunction against Newzbin, restricting them from providing links to the content owned by the claimants.[48] Newzbin was taken down shortly after, but reappeared at the same domain days later, this time operating in Sweden under a slightly different name.

Newzbin2[49] had a different focus. It was not against Newzbin itself (at this point trading as Newzbin2). Although it was the same six studios, this time their action was against the ISP British Telecom (BT) seeking an injunction to force BT to block access to Newzbin2 – this being the most direct route, rather than attempting to pursue a Swedish company. The case ultimately concluded that BT had actual knowledge of the infringement and thus it was permissible, under section 97A, to issue an injunction forcing BT to block access to Newzbin2.[50]

This first blocking injunction issued in the UK was followed in 2012 by forcing the six largest UK ISPs[51] to block The Pirate Bay,[52] then KAT,[53] H33t and Fenopy,[54] and the live streaming of football matches.[55] These judgements were all issued by Arnold J. The success of obtaining these injunctions, as well as the fact that it was a relatively hassle-free method of blocking access to content infringing websites (for content owners, at any rate) ensured the popularity of blocking injunctions as a viable method of enforcing copyrights. In addition, when ISPs ceased to argue

---

[44] *Twentieth Century Fox and others v British Telecommunications PLC*, [2011] EWHC 1981 (Ch) (*Newzbin2*).
[45] *Newzbin1* (n 4).
[46] Usenet is, according to the Oxford English Dictionary, '[a] non-centralized communication service comprising a large number of newsgroups, now typically accessed through the Internet.' It is, in a simplistic sense, a cross between an email chain and a discussion forum.
[47] Jeremy Phillips, 'A fable for modern times: the Fox and the Newzbin' (*The IPKat,* 29 March 2010) <http://ipkitten.blogspot.co.uk/2010/03/fable-for-modern-times-fox-and-newzbin.html> accessed 16 December 2015.
[48] *Newzbin1* (n 4), 135.
[49] *Newzbin2* (n 44).
[50] ibid 204.
[51] Those ISPs, incidentally, were Sky, BT, EE, TalkTalk, Telefónica [O2] and Virgin.
[52] *Dramatico Entertainment Ltd and others v British Sky Broadcasting Ltd and others* [2012] EWHC 268 (Ch).
[53] KAT stands for KickassTorrents.
[54] *EMI and others v BSkyB and others* [2013] EWHC 379 (Ch).
[55] *Football Association Premier League v BSkyB and others* [2013] EWHC 2058 (Ch).

against these injunctions, the financial burden associated with seeking an injunction was lessened, making them relatively quick and easy to obtain.

All the above judgments relate to P2P sites and streaming sites. They blocked 'first generation' torrent sites. The reach of these injunctions was extended the following year. The British Phonographic Industry (BPI) requested an order to block access to a list of 21 websites by the end of October 2013.[56] What was particularly interesting about this order was the fact that the 21 listed websites included linking sites, which did not host the content themselves. This issue was considered also regarding SolarMovie and TubePlus[57] – sites which provided a database of links to infringing content but did not actually host the content. SolarMovie allowed the downloading of content, where TubePlus did not, but both sites monitored the quality of links, as well as providing services to make the links easier to find, such as categorisation and referencing. This case then raised the question: does hyperlinking constitute an infringement of copyright? In considering this, Mr Justice Arnold made extensive reference to three cases before the CJEU,[58] but ultimately declared that mere hyperlinking is not communication to the public. However, he also declared that the websites in question in this case were doing more than just linking, and thus issued another blocking injunction.

In the first three years of UK blocking injunctions, the websites blocked were a variety of types (torrent aggregators, streaming sites, link curators) and covered a variety of content types (film, TV, music). The majority focus, however, was not on print. There was, in fact, a notable absence of focus on print – the cases for blocking injunctions were brought by film studios and music companies, and the Football Association Premier League. The blocking of torrent aggregators did also benefit publishers though, as a blocked torrent aggregator or link site cannot direct pirates to illegitimate copies of print material. It was not until 2015 that there was a successful application for a blocking injunction made by print publishers – in May 2015, seven websites were the subject of a blocking injunction action brought by the PA,[59] the same organisation which administers the Copyright Infringement Portal. The sites were link providers and curators which provided access to an estimated ten million books – PA investigations showed that upwards of 80% of content

[56] *1967 Ltd and others v British Sky Broadcasting Ltd and others* [2014] EWHC 3444 (Ch).
[57] *Paramount Home Entertainment and others v BSkyB and others* [2013] EWHC 3479 (Ch).
[58] *Svensson and others* (Case C-466/12), *C More Entertainment* (Case C-279/13), and *Bestwater* (Case C-348/12).
[59] Publishers Association, 'Publishers Win High Court Support in Fight Against Infringement' (Press Release, 26 May 2015).

available on the websites was unlawful.[60] The application was not contested in court – ISPs had ceased to argue against these cases by this point – and the order was given to block the sites. The seven blocked sites[61] then brought to over 120 the number of sites blocked under the section 97A provisions.[62] When one takes into account the proxies, redirects, and clones which are also required to be blocked under the injunctions, the number of sites blocked is over 500.[63] For content owners and their representative bodies, blocking injunctions are something of a no-brainer. Given the lack of opposition from ISPs, and the fact that orders are often made without the need for a full hearing or judgement, they are a simple and relatively quick way to block access to infringing sites.

However, that is not to say that they are infallible. The injunctions apply only to consumer broadband, meaning that the sites are still accessible through mobile, business, or other types of internet access. Indeed, during the course of research, the author was able to access all the sites listed as blocked, as she was working on a university internet connection, not a consumer broadband connection. However, the deterrent effect of a block on consumer broadband should not be underestimated.

Ireland

In late 2010, Mr Justice Peter Charlton noted[64] a lacuna in the Irish law – that Irish rights holders could not seek an injunction against an ISP requiring them to block access to a website which was infringing their copyright. He believed that this was due to a failure to properly transcribe the

---

[60] Henry Mance, 'Book Publishers Win Landmark Case Against eBook Pirates' (*Financial Times*, 26 May 2015) <http://www.ft.com/cms/s/0/988850e0-038c-11e5-a70f-00144feabdc0.html#axzz3bG2vyKuv> accessed 24 July 2015.

[61] Ebookee, LibGen, Freshwap, AvaxHome, Bookfi, Bookre, and Freebookspot.

[62] Sky, 'Websites we've blocked under order of the High Court' (*Sky)* <http://help.sky.com/articles/websites-blocked-under-order-of-the-high-court> accessed 15 July 2015; List of Court Orders <http://www.ukispcourtorders.co.uk/> accessed 15 July 2015.

[63] Darren Meale, '500 and Counting: websites blocked by order of UK courts' (*The IPKat,* 29 July 2015) <http://ipkitten.blogspot.co.uk/2015/07/500-and-counting-websites-blocked-by.html> accessed 19 December 2015; TalkTalk, 'Access restricted to certain file sharing websites' (*TalkTalk)* <http://help2.talktalk.co.uk/access-restricted-certain-file-sharing-websites> accessed 14 January 2016; Darren Meale, 'Access Blocked! List of UK ISP blocking injunctions' (*eLexica,* 20 July 2015) <http://www.elexica.com/en/legal-topics/intellectual-property/29-access-blocked> accessed 14 January 2016.

[64] This observation was made in the case *EMI Records (Ireland) Ltd and others v UPC Communications Ireland Ltd* [2010] IEHC 377. Incidentally, this is the case which originally established that UPC was not required to implement a GR system like that of Eircom, although it was later subject to a different GR system.

requirements of certain EU Directives, including the E-Commerce Directive,[65] the InfoSoc Directive,[66] and the Copyright Enforcement Directive[67] into Irish law.[68]

In response to this, the government sought closing this lacuna, doing so in the form of the European Union (Copyright and Related Rights) Regulations, 2012 (the CRR Regulations). Article 8(3) of the InfoSoc Directive provides that 'each Member State shall ensure that the rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or related right.'[69] The CRR Regulations provide for this by amending Sections 40 and 205 of the Copyright and Related Rights Act 2000.[70] They inserted into each section a provision that copyright owners may apply to the High Court for an injunction against such intermediaries.

The proposal of the Regulations met with strenuous objections from the Irish public. They were quickly dubbed Irish SOPA[71] and met with some controversy due to the fact that they were a statutory instrument, and thus were neither subject to consultation nor voted on in the Oireachtas (the Irish parliament). Numerous articles were published and arguments were made for and against the regulations, in the Daily Business Post,[72] TheJournal.ie,[73] Ireland's public broadcaster RTÉ,[74] and on their Prime Time TV broadcast,[75] and they were even commented on by Mr Justice

---

[65] E-Commerce Directive (n 9).
[66] InfoSoc Directive (n 3).
[67] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L195/16.
[68] *EMI v UPC* (n 64) 133.
[69] InfoSoc Directive (n 3) Art 8(3).
[70] Copyright and Related Rights Act 2000 (Ireland).
[71] The proposed American bill (A Bill to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property, and for other purposes —HR 3261 (2011) (SOPA)) envisaged wide-ranging powers to grant injunctions blocking access to sites with infringing content. It was hotly protested, as discussed infra.
[72] Adrian Wreckler, 'Reality Bytes: Ten-point guide to 'Irish SOPA' row' (*The Daily Business Post,* 29 January 2012) <http://www.businesspost.ie/reality-bytes-ten-point-guide-to-irish-sopa-row/> accessed 14 January 2016.
[73] Michael Freeman, 'Ireland's 'SOPA' Legislation: The big arguments for and against' (*TheJournal.ie,* 26 January 2012) <http://www.thejournal.ie/ireland%e2%80%99s-%e2%80%98sopa%e2%80%99-legislation-the-big-arguments-for-and-against-336952-Jan2012/> accessed 14 January 2016; TJ Macintyre, 'Everything you need to know about Ireland's SOPA' (*TheJournal.ie*, 24 January 2012) <http://www.thejournal.ie/readme/reader-irelands-sopa-a-faq/> accessed 14 January 2016.
[74] Niall Kitson, Why 'Ireland's SOPA' could be a good thing' (*rte.ie*, 27 January 2012) <http://www.rte.ie/news/business/technology/2012/0127/311599-sopa/> accessed 14 January 2016.
[75] RTÉ, 'Prime Time' (26 January 2012) <http://www.rte.ie/news/player/2012/1112/3180372-prime-time-copyright-law-changes-and-sopa/> accessed 14 January 2016.

Charleton,[76] the judge who originally recommended the closing of the lacuna. The Regulations were hotly debated and discussed. A website was also established to direct the campaign against the CRR Regulations, http://stopsopaireland.com,[77] encouraging Irish citizens to talk to their local TD[78] and attempt to stop the regulations. The main complaint aired against the regulations was that they were unduly vague. Indeed, while the UK section 97A gives specific direction as to what constitutes 'actual knowledge' of infringement, including whether or not the service provider has received a written notice of the infringement,[79] by comparison, the CRR Regulations give no such specification, stating only that right holders may apply for an injunction under the provisions of InfoSoc Article 8(3), and the court 'shall have due regard to the rights of any person likely to be affected by virtue of the grant of any such injunction'.[80] Thus, it is clear that the UK provisions are more prescriptive when it comes to the circumstances in which an injunction may be granted. In spite of varied and enthusiastic protesters, the Regulations received Ministerial consent and on February 29, 2012, were signed into law.[81]

Despite Minister Sherlock's assertions that the Regulations would not be used to block access to sites (a strange assertion, considering that was exactly their purpose),[82] the first injunction was issued the following year, in The Pirate Bay case.[83] It is worth noting that the parties were the same as the 2010 case which stated the need for the CRR Regulations, these being the second through seventh[84] largest ISPs in the country.[85] The facts were also the same. The judgement was

---

[76] See TJ Macintyre, 'The law should be predictable as to what is mandated and what is forbidden' (*IT Law in Ireland*, 5 February 2012) <http://www.tjmcintyre.com/2012/02/law-should-be-predictable.html> accessed 14 January 2016.
[77] Stop SOPA Ireland <http://stopsopaireland.com/> accessed 14 January 2016.
[78] TD – Teachta Dála, a member of Dáil Éireann, the lower house of the Irish Parliament.
[79] CDPA (n 43) s 97A.
[80] Copyright and Related Rights Act 2000 (As Amended) s 40 (5A) (Ireland).
[81] European Union (Copyright and Related Rights) Regulations 2012 SI 2012/59 (Ireland). The main proposal for SOPA Ireland came from Minister of State for Research and Innovation Seán Sherlock.
[82] Seán Sherlock TD (@seansherlocktd) (Tweet, 24 January 2012) 'There is no intention by the government to introduce legislation to block access to the Internet or sites. I have state [sic] that unambiguously.' <https://twitter.com/seansherlocktd/statuses/161600885435281409> accessed 13 January 2016.
[83] *EMI and others v UPC and others* [2013] (n 5).
[84] By name, these ISPs are UPC, Vodafone, Imagine, and Digiweb, Hutchinson 3G [Three] and Telefónica Ireland [O2] - only one of which [Telefónica, or O2] is the same as the six largest in the UK. Since the issuance of this injunction, Hutchinson 3G purchased Telefónica's Irish operations (Conor Humphries and Clare Kane, 'Telefonica sells O2 Ireland to Hutchinson's 3 for $1billion' (*Reuters*, 24 June 2013) <http://uk.reuters.com/article/2013/06/24/uk-telfonica-ireland-idUKBRE95N05N20130624> accessed 14 January 2016), merging the two and creating a 40% market share, equal to Eircom. UPC also became Virgin Media, changing the shared largest companies from one (of six) to two (of five). See Virgin Media Ireland, 'UPC Confirms Plans to Become Virgin Media in Ireland' (Press Release, 28 August 2015).
[85] The largest ISP, Eircom, was already required to block The Pirate Bay in accordance with the circumstances discussed in Chapter 3 under the section 'Ireland'.

relatively simple – Charleton J had stated already of the injunctive relief 'were it available, I would grant it'.[86] In this case, while the original order was granted without issue, the issues to be discussed were the necessity to reapply to the court were The Pirate Bay to change its location on the internet, and which parties should bear costs. With regard to the first issue, McGovern J relied on the persuasive authority of Arnold J in *20th Century Fox Film Corporation v British Telecoms Plc*,[87] bringing Irish jurisprudence into line with that of England and Wales, accepting the draft order submitted to the court which eliminated the need to reapply in such a case, and using the new legislation to resolve the lacuna which had been noted in the earlier *EMI v UPC*[88] case. The same regulations have since been used to block access to more infringing websites, such as KAT,[89] in an order made in the Commercial Court in December 2013.[90] Although it appeared at the time that blocking injunctions would become an accepted tool much like in the UK, no injunctions have been sought since. The reasons for this may be a potential future research project.

United States

In October 2011, a pair of Bills were put to both houses of the US government. The Stop Online Piracy Act (SOPA) in the lower house[91] and the Protect Intellectual Property Act (PIPA) in the upper house were separate but complementary acts designed to grant extra powers to prevent the infringement of copyright online. Provisions of the Act included allowing the issuing of court orders to prevent advertisers from contracting with infringing websites, increasing the penalties for online copyright infringement, making streaming a criminal offence, and the creation of a power to issue a court order blocking access to copyright infringing websites.[92] Although the bills

---

[86] *EMI v UPC* (n 64).
[87] *20th Century Fox Film Corporation v British Telecoms Plc* [2012] Bus LR 1461 1528, para 12: 'In my judgment an injunction limited to 'sole purpose' would be too easily circumvented to be effective. Furthermore I do not consider that the studio should be obliged to return to court for an order in respect of every single IP address or URL that the operators of newzbin2 may use. In my view the wording proposed by the studio strikes the appropriate balance. If there is a dispute between the parties as to whether the predominate purpose of an IP address or URL is to enable or facilitate access to newzbin2, they will be able to apply to the court for a resolution of the dispute. In saying this, I do not mean that BT will be obliged to check IP addresses, or URLs notified by the studios. It will be the studios' responsibilities accurately to identify IP addresses and URLs to be notified to BT.'
[88] *EMI v UPC* (n 64).
[89] KAT was also the subject of a UK blocking order, as discussed earlier.
[90] Tim Healy, 'Internet firms ordered to block file-share sites' (*The Irish Independent,* 3 December 2013) <http://www.independent.ie/irish-news/courts/internet-firms-ordered-to-block-fileshare-sites-29803417.html> accessed 14 January 2016.
[91] SOPA (n 71).
[92] SOPA (n 71) sec 102(2)(A)(i).

were paired, the main reaction online was to SOPA, and thus this section is concerned also mainly with SOPA.

To say that SOPA was opposed would be something of an understatement. It was the subject of a co-ordinated online campaign against the imposition of provisions that were declared to 'undermine the openness and free exchange of information at the heart of the Internet. And [...] violate the First Amendment.'[93] From their inception, the two bills were subject to protest, including before they reached the house floor. A major part of this was the 'Blackout' protest which took place in January 2012. Some 115,000 websites,[94] including Google and the English-language Wikipedia took down their services, or placed banners on their front page, stating that SOPA would damage the free and open internet. On the same day, there were also physical protests in New York, San Francisco, and Seattle.[95] Criticism of the bills was not restricted to solely a grassroots campaign crying censorship – academic criticism also pointed out that the method of blocking would destabilise the internet,[96] stifle innovation,[97] and impact on cybersecurity.[98] The massed outcry against SOPA and PIPA was successful – by the end of January 2012 the bills were removed from further voting.

Australia

In Australia, until 2015 the prevailing law with regard to the liability of ISPs was *AFACT v iiNet*.[99] In this particular case, the appellants were 34 companies who owned a variety of copyrights in 'thousands of commercially released films and television programs'.[100] Under the representation of the Australian Federation Against Copyright Theft (AFACT), they sued the second-largest ISP in the country, iiNet Limited, seeking a declaration that by allowing their users to infringe copyright,

---

[93] Laurence H Tribe, 'The "Stop Online Piracy Act" (SOPA) violates the first amendment' (*Scribd*, December 6, 2011) <http://www.scribd.com/doc/75153093/Tribe-Legis-Memo-on-SOPA-12-6-11-1> accessed 10 August 2015.
[94] Jenna Wortham, 'Public Outcry over Antipiracy Bills Began as Grass-Roots Grumbling' (*The New York Times,* 19 January 2012) <http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?pagewanted=1&ref=technology&_r=0> accessed 10 August 2015.
[95] Jenna Wortham, 'With Twitter, Blackouts and Demonstrations, Web Flexes Its Muscle' 18 January 2012 <http://www.nytimes.com/2012/01/19/technology/protests-of-antipiracy-bills-unite-web.html?ref=technology&_r=0> accessed 10 August 2015.
[96] Mark A Lemley, David S Levine and David G Post, 'Don't Break the Internet' (2012) 64 Stanford Law Review Online 34.
[97] Michael A Carrier, 'SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements' (2013) 11(2) Northwestern Journal of Technology and Intellectual Property 21.
[98] Association for Computer Machinery US Public Policy Council, 'Analysis of SOPA's impact on DNS and DNSSEC' (2012) <http://usacm.acm.org/images/documents/DNSDNSSEC.pdf> accessed 14 January 2016.
[99] *Roadshow Films Pty Ltd and others v iiNet Ltd* [2012] HCA 16.
[100] ibid [2].

they themselves were infringing copyright. The case was dismissed in the first instance in the Australian Federal Court by Cowdry J, declaring that 'iiNet is not responsible if an iiNet user chooses to make use of that system to bring about copyright infringement'[101] and awarding costs to iiNet.

AFACT appealed to the Full Court of the Australian Federal Court, resulting in a dismissal in 2011,[102] and then to the Australian High Court, which was also dismissed, this time unanimously.[103] The Full Court appeal did find, however, by both Emmett and Jagot JJ,[104] that liability can be attached to ISPs for allowing their customers' infringement under specific circumstances. The Full Court decision (which is largely the same as the subsequent High Court appeal) gave far more concessions to copyright holders, and was branded a 'hollow victory'[105] by journalist David Brennan, who pointed out that the appeal decision 'offers much to the film production companies who sued iiNet.'[106] This was due to the trial judge's statement that, had the notices been more specific, iiNet may have been subject to some liability.[107] Thus, with guidance from the courts on what specifically would be required in notices, going forward, iiNet could be held responsible in certain cases, for authorising infringement. But such responsibility would only be in cases where specific detailed notices were delivered to the ISP, and ISPs were not, through any inaction, inferred to have authorised any act of infringement.[108]

Although the Australian Law Reform Commission did have an ongoing consultation which concluded after the *iiNet* decision,[109] the liability of ISPs or other third parties was outside the Terms of Reference of the inquiry.[110] Later in 2014, the Abbott government published a discussion

---

[101] *Roadshow Films Pty Ltd v iiNet Limited (No 3)* [2010] FCA 24 [19].
[102] Emmett and Nicholas JJ dismissed, Jagot J dissenting: *Roadshow Films Pty Ltd and others v iiNet Ltd* [2011] FCAFC 23.
[103] *iiNet* [2012] (n 99).
[104] *iiNet* [2011] (n 102) [274] [Emmett J] (It does not necessarily follow from the failure of the present proceeding that circumstances could not exist whereby iiNet might in the future be held to have authorised primary acts of infringement on the part of users of the services provided to its customers under its customer service agreements) and [477] [Jagot J] (These circumstances support my conclusion that iiNet authorised the primary infringements of copyright).
[105] David Brennan, 'iiNet's hollow victory over Hollywood' (*The Sydney Morning Herald*, February 25, 2011) <http://www.smh.com.au/federal-politics/society-and-culture/iinets-hollow-victory-over-hollywood-20110225-1b7qa.html> accessed 14 January 2016.
[106] ibid.
[107] *iiNet* [2011] (n 102) [274].
[108] *iiNet* [2012] (n 99) [62].
[109] Australian Law Reform Commission, 'Copyright and the Digital Economy: Final Report' (2013) ALRC Report 122.
[110] Australian Law Reform Commission, 'Copyright and the Digital Economy' (2012) ALRC Issues Paper 42.

paper on Online Copyright Infringement,[111] which sought responses to a public consultation. One suggestion the paper made was to introduce an injunction scheme based on that of Ireland and the UK, with blocking injunctions. The consultation closed in September 2014.[112] The (just over one hundred) submissions to the consultation were made available online.[113] In July of 2015, the Australian Parliament passed the Copyright Amendment (Online Infringement) Act 2015,[114] which inserted a new provision into the Copyright Act 1968[115] granting the power to order blocking injunctions against ISPs. The injunctions would require ISPs to block sites outside of Australia which facilitate copyright infringement as the primary purpose of the site, regardless of whether that infringement is in Australia or not. This is a less stringent requirement than the British section 97A, as there is no requirement for actual knowledge of the infringement, nor is there any definitive information as to how the 'primary purpose' of a site may be defined. This is a question for the Australian courts to decide.

The rapid change from the 2012 *iiNet* decision refusing to impose liability on ISPs to the 2015 injunctive power is interesting, as it demonstrates an almost 180-degree rotation for the Australian governance, certainly a noteworthy one. However, it is also important to note that the 2013 election and subsequent new government may have some responsibility for this difference. This turnaround, however, may also be indicative of a change in attitude more globally. For the US, where the reaction to proposed blocking measures was so vehement, the rapid development in Australia may bode well for a potential reintroduction of similarly framed legislation. Nonetheless, there is still a distinction to be drawn between blocking and censorship – at times a fine line to walk.

Analysis

From the above discussion, we can see that the provision of legislation to facilitate injunctions forcing ISPs to block access to certain websites is gaining popularity in more than one jurisdiction, even Australia, which had previously rejected such a provision. It may well be that this is an example of growing movement to pass responsibility toward ISPs. In the European Union, this ability is provided via the InfoSoc Directive, specifically by Article 8(3), which was then transposed

[111] Attorney-General for Australia, 'Online Copyright Infringement' (Press Release, 30 July 2014).
[112] ibid.
[113] Now defunct, the submissions were available previously. Online Copyright Infringement Submissions <http://www.ag.gov.au/Consultations/Pages/OnlineCopyrightInfringement-Submissions.aspx>.
[114] Copyright Amendment (Online Infringement) Act 2015 (Australia).
[115] Copyright Act 1968 s 115A (Australia).

into Member States' national laws.[116] The whole-hearted embracing of such blocking injunctions is nowhere more clear than in the UK, which had blocked over 500 sites (including mirrors and proxies) by mid-2015, with Notice and Takedown and blocking injunctions both being embraced by publishers, more so than graduated response systems – demonstrated by over three million takedown notices sent by the PA Copyright Infringement Portal alone,[117] and the PA's blocking orders against book piracy sites.[118]

Thus, the nature of blocking injunctions would hopefully deter the casual or lazy copyright infringer. Further, with the leak of the Trans-Pacific Partnership (TPP) IP chapter in May 2015,[119] it can be seen that blocking injunctions are also a topic of discussion in international agreements. If the leak is accurate, and if the negotiations continue to keep this as a part of the agreement, blocking injunctions will receive greater prominence by the TPP's necessitating their introduction in signatory countries. As Eleonora Rosati queries, is 2015 the year of the blocking injunction?[120] It certainly seems so, with countries around the world introducing the power into their legislative repertoires, international agreements considering the measure, and Mr Justice Arnold opining in *Cartier v BSkyB* that there was no measure as effective as blocking injunctions currently on the statute books.[121]

The effectiveness of such injunctions is sometimes incomplete. As previously mentioned, the blocks are only applied to consumer broadband. Even then, such an injunction can be avoided by changing ISP in some cases, or by utilising a proxy service or a VPN. In research conducted by Ofcom in 2010, the conclusion was that all site blocks could be circumvented by determined pirates.[122] Furthermore, as can be anecdotally seen in the comments of any article mentioning blocking access to a site, or even a list of sites,[123] the nature of the internet is such that any site will

---

[116] Article 8(3) injunctions are available in many European Member states, including Denmark, Belgium, Italy, Sweden, the Netherlands and Austria. *Newzbin2* (n 44) [94].
[117] Anker (n 23).
[118] Mance (n 60).
[119] Trans-Pacific Partnership, 'IP Chapter' (2015) <http://keionline.org/sites/default/files/Section-G-Copyright-Related-Rights-TPP-11May2015.pdf> accessed 14 January 2016.
[120] Eleonora Rosati, '2015: the year of blocking injunctions?' (2015) 10(3) Journal of Intellectual Property Law & Practice 147.
[121] ibid, citing *Cartier International AG and Others v BSkyB and Others* [2014] EWHC 3354 (Ch).
[122] While this report related to sections 17 and 20 of the Digital Economy Act 2010, the technology for blocking sites would have been the same, regardless of which section the injunction was ordered under. Ofcom, '"Site Blocking" to reduce online copyright infringement' (2010) <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> accessed 19 December 2015.
[123] See, for example, the comments on Gavan Reilly's article regarding the blocking of The Pirate Bay – Gavan Reilly, 'High Court orders six Irish internet providers to block The Pirate Bay' (*TheJournal.ie,* 12

have multiple clones, and alternatives. Nevertheless, the effort involved in finding an alternative may well be too much for casual pirates, and so the deterrent effect of blocking injunctions should not be underestimated – it may well be effective in stopping some degree of online piracy, as demonstrated by the statistics in *Cartier*.[124] Therefore, although forcing ISPs to restrict access to websites may not be the golden goose which will stop piracy that it may seem to be, it does have some benefits. In this author's opinion, ordering ISPs to block infringing websites is somewhat akin to fighting the hydra by cutting off its head.[125] Two will spring back in its place – this is aptly demonstrated by the number of proxy and mirror sites which are listed as blocked along with those sites to which the UK injunctions refer. The stumps must be charred to prevent regrowth. How this can be effected, however, is a difficult question. An oblique approach may be more effective than facing the monster head-on. Perhaps the pertinent question then is not how do we block access to infringing websites, but how do we redirect consumers to legitimate avenues? This approach is not unique to the author – it can be seen in the multi-pronged approach of newer GR systems, which aim to educate consumers as well as deterring them from illegitimate content,[126] as well as other initiatives backed by the City of London Police, copyright holders, collective management organisations, and governments themselves.[127]

Conclusion

From 2010-2015, copyright enforcement saw much global development. For film, TV and music industries, tackling piracy and infringement was in strong focus, with a variety of approaches taken, including seeking to take down infringing files, disable the infringing websites (such as in *Newzbin1*[128]), and seeking ISPs blocking the websites (as in *Newzbin2*[129]). The UK is invested in learning from the example of others, and conducts research comparing different approaches to

June 2013) <http://www.thejournal.ie/high-court-order-block-pirate-bay-948503-Jun2013/> accessed 14 January 2016 – which suggest alternative torrent sites and VPN providers.

[124] *Cartier v BSkyB* (n 119) [223]-[227].

[125] The Lernaean Hydra was a mythical Greek monster possessing many heads. The second labour of the demigod Heracles was to slay the Hydra, which he attempted first by removing its heads. However, the reaction was that two heads grew back for each head removed. Thus, in order to prevent this happening, Heracles cauterised the stumps of the severed heads – only then could the Hydra be defeated. Pierre Grimal, *A Concise Dictionary of Classical Mythology* (Stephen Kershaw ed, AR Maxwell-Hyssop tr, Blackwell 1986).

[126] This is discussed in Chapter 3.

[127] For more on this, see Chapter 7.

[128] *Newzbin2* (n 44).

[129] *Newzbin1* (n 4).

online copyright infringement.[130] This 2015 IPO research paper demonstrates the UK's commitment to not only monitoring the approach of other countries to copyright, comparing both public spend[131] and legislative vs voluntary models,[132] but also actively trying to learn from them.[133] The results of this paper will then be used to inform future legislation and policy, leading to more effective and smarter ways of managing copyright.

Despite the enthusiastic participation by content creation industries in the mechanisms available to protect their copyrights, this author remains sceptical about whether they alone are an effective solution to piracy problems. The blocking systems outlined above can be circumvented without a massive amount of effort – in some cases by an action as simple as changing ISP.[134] Further, the requirement that content owners send notices regarding specific instances of copyright infringement creates the necessity of a cat-and-mouse game where content uploaders are infringing with impunity, as they can re-upload files (which can in turn be downloaded) faster than content can be found and taken down.[135] As well as this, uses of proxies and VPNs through countries without blocking restrictions will allow determined pirates to access those sites regardless. Equally, similar to the takedown systems, while blocking injunctions are effective at blocking access to a particular site, a clone or related site will inevitably appear before too long.

As the discussion of Hadopi's GR system in the previous chapter showed, Arnold and others did not find that the introduction of Hadopi had any significant effect on the legal sales of films or music.[136] While blocking injunctions and GR schemes may deter consumers from certain types of piracy – either through a particular site (such as The Pirate Bay) or through a certain method (such as torrents), there is as yet no evidence that it encourages those consumers to obtain content legally instead. In fact, the deterrent effect of blocking and taking down content is only slight – infringement continues as before once new sources for the content can be located.[137] Thus, if the consumer would not and does not purchase the content, is the implementation of GR and ISP

---

[130] IPO, 'International Comparison of Approaches to Online Copyright Infringement: Final Report' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404429/International_Comparison_of_Approaches_to_Online_Copyright_Infringement.pdf> accessed 14 January 2016.
[131] ibid 23.
[132] ibid 6.
[133] ibid 26-29.
[134] In the UK, only the largest ISPs are subject to the blocking orders, thus avoiding the blocks requires only seeking internet subscriptions from smaller providers.
[135] Lauinger and others (n 37).
[136] Michael A Arnold and others, 'Graduated Response Policy and the Behavior of Digital Pirates: Evidence from the French Three-Strike (Hadopi) Law' (2014) SSRN <http://ssrn.com/abstract=2380522> accessed 22 December 2015
[137] Lauinger and others (n 37) 13.

liability creating a lot of fuss with no real result? Certainly the massive success of streaming services such as Spotify and Netflix[138] suggest that consumers are willing to pay for content – but it must be at the right price. This encouragement idea is demonstrated the voluntary GR systems, especially those which are paired with an educational focus, such as in the UK.[139] The mind-set change efforts are as important, if not more so, as the deterrent aspects of any enforcement mechanisms. This is also clear in the conclusions of the Clickonomics report,[140] which advocated for tackling piracy higher up the chain, and focusing on squeezing those who profit directly from piracy, using the 'follow the money' approach. This approach is discussed more fully later in the thesis, as it focuses not on those who actually infringe copyright, the uploaders and downloaders, but those who profit from the piracy chain, the advertisers who gain from the websites which enable content infringement.[141]

For publishers and those related to the print industry, while tackling piracy is a concern – as shown by the PA's Copyright Infringement Portal and the successful application for blocking injunctions in 2015 – it is not one which has had as long a history as music or films. But this is not to say that there has been no enforcement of copyright – indeed, the three million notices issued by the Portal serve as evidence to the contrary.[142] The slightly slower movement towards enforcement may simply be due to the fact that the publishing industry has been slower to convert to digital, and thus took longer to see the impact on profits which has affected other creative industries – while digital music arrived in the late 90s and early 00s,[143] ebooks began to rise only in the late 00s and early 10s.[144] Of course it is wrong to say that publishers and the publishing industry were not affected by the digital shift or the issues discussed above – they are simply slightly further behind

---

[138] As mentioned in Chapter 3, Spotify had 60 million subscribers as of 2014: Stuart Dredge, 'Spotify financial results show struggle to make streaming music viable' (*The Guardian,* 11 May 2015) <http://www.theguardian.com/technology/2015/may/11/spotify-financial-results-streaming-music-profitable> accessed 16 October 2015; Netflix had 62 million members in mid-2015: Netflix, 'Netflix to Announce Second-Quarter 2015 Financial Results' (Press Release, 12 June 2015).

[139] See, for example, the CCUK television spot mentioned in the previous chapter, which points consumers toward legitimate avenues of content consumption. The Drum, 'Ad for Creative Content UK' (*YouTube,* 23 October 2015) <https://www.youtube.com/watch?v=DWWAFM284Yk> accessed 15 December 2015.

[140] Lauinger and others (n 37).

[141] For more on this, see Chapter 7.

[142] Anker (n 23).

[143] The IFPI's 2009 Digital Music Report showed a dramatic increase in music revenues from 2004 to 2009, with tenfold growth in revenue: IFPI, 'Digital Music Report 2009' (2009).

[144] Tablet and e-reader ownership increased from 2010-2014, with 32% of survey participants owning an e-reader in 2014. Pew Research Media, 'E-Reading Rises as Device Ownership Jumps' (2014) <http://www.pewinternet.org/files/old-media//Files/Reports/2014/PIP_E-reading_011614.pdf> accessed 30 November 15.

in terms of timelines. There is no doubt that these are still very real concerns for publishers, and they have contributed enthusiastically to relevant movements, such as sitting on the Licences for Europe committees,[145] contributing to the Hargreaves review,[146] and other consultations and reform procedures. It may be fair to say that for publishers, the simplification of licensing is the area of the most concern – not just to make the operation of their industry easier, but also to ensure that their business models are not affected by the need to implement new licensing exceptions due to market failure. This is demonstrative of the fractured nature of publishing – while film, TV, and music are largely consumer-focused, for publishing, there is a more split focus, with distinctions between academic/professional, fiction, education, journals, newspapers, and professional publications, thus splitting the focus of the industry[147] – this may further explain their slower reaction to adopting enforcement mechanisms.

---

[145] eg CLA, FEP and Guardian Media on Working Group 2: Commission, 'List of Participants in Working Group 2 – User-Generated Content and Licensing for Small-scale Users of Protected Material' (2013) <http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/131213_wg2-list-of-participants.pdf> accessed 30 November 2015; EMMA, ENPA, PLS, Reed Elsevier on Working Group 4: Commission 'List of Participants in Working Group 4 – Text and Data Mining' (2013) <http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/131213_wg4-list-of-participants.pdf> accessed 30 November 2015.

[146] Hargreaves Submissions: Association of Learned and Society Publishers, 'ALPSP response to Independent Review of Intellectual Property and Growth' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-alpsp.pdf> accessed 14 January 2016; European Publishers Council, 'Submission from the European Publishers Council to the Independent Review of Intellectual Property and Growth – The Hargreaves Review - March 2011' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-europepub.pdf> accessed 14 January 2016; International Association of Scientific, Technical and Medical Publishers, 'STM Submission for the Independent Review of Intellectual Property and Growth' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-istm.pdf> accessed 14 January 2016; Professional Publishers Association, 'Independent Review of Intellectual Property and Growth PPA Response – March 2011' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-ppa.pdf> accessed 14 January 2016; Publishers Licensing Society, 'Independent review of Intellectual Property and growth PLS response to call for Evidence' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-pls.pdf> accessed 14 January 2016; Publishers Association, 'Driving Innovation: Delivering Growth' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-thpa.pdf> accessed 16 December 2015.

[147] This split is visible in distinctions such as the fact that the PA Statistics Yearbook (Publishers Association, 'PA Statistics Yearbook' (2013)) does not cover magazine or newspaper publishing, or even in the existence of the CLA and the NLA simultaneously.

Chapter 5: Core Copyright and the UK Economy

Introduction

With the emphasis on the cost of piracy to the copyright industries, and the statement that copyright is preventing innovation which could be profitable to the UK economy, the question arises of what the actual economic contribution of the copyright industries to the UK GDP stood at during the research period. The purpose of this chapter is to provide both an estimate and an understanding of the contribution of the copyright industries to the UK economy. This will take the form of original research as well as an assessment of other research available on a range of similar and related principles. Copyright's role as a balance between allowing access to content and knowledge and providing financial incentives to creators is also demonstrated in its dual role as a legal protection and an economic contributor. Thus, as ever, the balance between these two is vitally important. A greater understanding of the economic contribution of the copyright industries will then lead to a more nuanced view of the necessity of making changes to copyright.

The economic analysis and rationale for copyright is approached from two different perspectives – the incentive and neoclassical approaches.[1] Although these approaches diverge sharply in their applications of the basic principles,[2] both are based on wealth maximisation and allocative efficiency, ie maximising the profit from copyright works and achieving efficient outcomes. Efficient outcomes are achieved when production is not more or less than demand requires – when they are at equilibrium. Thus, while the economics of copyright and the debate therein are certainly interesting,[3] for the purposes of this chapter, the discussion will bypass that debate and focus on the financial and employment contribution of the copyright industries to the UK economy. This chapter will use the guidelines established by the World Intellectual Property Organization (WIPO) in their 2003 'Guide on Surveying the Economic Contribution of Copyright-Based Industries'[4] to estimate the value of the core copyright industries to the UK economy. It will use then these figures to compare with other countries that have published reports using the same methodology. Furthermore, this chapter will then juxtapose this against a variety of research on the topic of the economic contribution of copyright and creative industries

[1] Neil Weinstock Netanel, 'Copyright and a Democratic Civil Society' (1996) 106 Yale Law Journal 283.
[2] ibid 308.
[3] For more on this, see Diane Leenheer Zimmerman, 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12 Theoretical Inquiries in Law 29; Gregory N Mendel, 'To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity' (2011) 86 Notre Dame Law Review 1999; Ronald M Dworkin, 'Is Wealth A Value?' (1980) 9(2) Journal of Legal Studies 191.
[4] WIPO, 'Guide on Surveying the Economic Contribution of Copyright Industries' (2003) (WIPO Guidelines).

in order to obtain a different view of the value of copyright and creative industries to the UK as well as an understanding of what further research needs to be conducted.

As can be seen in other areas of this thesis, the digital revolution has been of vital importance for copyright users and copyright holders, irreversibly changing the way we interact with copyright materials. In tandem with this change has come a growing interest in copyright – it has come to be seen as more than a legal system providing an environment for creative activities; it is a business asset attracting licensing, investment, trade and transfers for some, and an insurmountable barrier preventing access to information for others. Whatever the attitude one holds towards copyright, it is more than clear that it plays a significant role in the economy of the UK. With the UK being a net exporter of music in 2012[5] and research since 2004,[6] globally ranked in terms of scientific citations,[7] and a historically stable presence in international science in 2015,[8] as well as being a global player in the publishing industry, it is clear at a glance that the copyright industries are important to the UK economy. It is for these reasons that the author felt an understanding of the value of the copyright industries in the UK would be beneficial in allowing for a greater understanding of the role copyright plays in the modern United Kingdom. Thus, this chapter will use the WIPO guidelines to synthesise the value of the core copyright industries to the UK economy, comparing this both with the findings of other countries that have published WIPO reports, and with other figures produced by the UK government which estimate the value of the 'creative industries' in the UK.

WIPO Guidelines

In 2003, WIPO published a set of guidelines outlining how to survey the contribution of copyright to the industry of a particular country. This 100 page Guide on Surveying the Economic Contribution of the Copyright-Based Industries[9] began with a discussion of previous surveys attempting to achieve the aims of economic analysis, then a legal and economic discussion of

---

[5] UK Music, 'The Economic Contribution of the Core UK Music Industry' (2012) <http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry___WEB_Version.pdf> accessed 29 December 2015, 5.

[6] Publishers Association, 'Memorandum from the Publishers Association', Appendix 20, Select Committee on Science and Technology Written Evidence (2004).

[7] 'The UK is ranked third in terms of the number of citations its research receives, at 11.6% of the global total': Department of Business, Innovation and Skills, 'Growth Dashboard: 22 January 2015' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396740/bis-15-4-growth-dashboard.pdf> accessed 11 November 2015.

[8] Bruce A Weinberg, 'An Assessment of British Science Over the Twentieth Century' (2009) 119 The Economic Journal F252.

[9] WIPO Guidelines (2003) (n 4).

copyright, followed by a categorisation of industries which rely on copyright into one of four different types of copyright industries, and a framework and measurement outline for a study which would be created following these guidelines.

In the years from publication to 2014, numerous countries published studies following these guidelines, allowing for easy comparison between the copyright industries of different countries. The UK has never been one of these countries, and has not produced such a study. In 2015, the Guidelines were revised and updated to allow for the changes which had occurred since their original publication.[10] However, due to the short length of time from their updating to the end of the doctoral research period, international comparisons were not available for the updated guidelines.

The practice of measuring the contribution of copyright to GDP[11] is visible from the late 20th century; the first complete studies were published in the 1970s, in Canada and Sweden.[12] The UK published two studies, in 1985[13] and 1993.[14] All the studies (not just the UK ones) showed that the contribution of copyright industries was higher than generally perceived. Many studies attempted to compare internationally,[15] but differences in methodology made this difficult. This showed the need for the WIPO guidelines, which allowed for easier comparison internationally via a centrally structured shared methodology. The guidelines list the types of works protected by copyright, the different rights associated with copyright, states that copyright is a property right and discusses the role copyright law plays in balancing productive efficiency, distributive efficiency and enhancing welfare, growth and development.[16] The discussion is extensive, and well balanced, but could be considered outdated when one acknowledged the advancements in technology, classification, and distribution that were seen in the time from its publication to 2014. For this reason, they were updated in 2015, but as mentioned, there was insufficient comparative data to use those updated guidelines. Thus, the 2003 WIPO guidelines are the best available comprehensive and widely used structure for analysis of the contribution of copyright industries

[10] WIPO, 'Guide on Surveying the Economic Contribution of the Copyright Based Industries' (2015 Revised Edition) (WIPO Guidelines).
[11] Gross Domestic Product (GDP) is the monetary value of all final goods and services produced in a certain period of time (yearly or quarterly).
[12] WIPO Guidelines (2003) (n 4) 10.
[13] Common Law Institute for Intellectual Property, The Economic Importance of Copyright (1985).
[14] Common Law Institute for Intellectual Property, The Economic Importance of Copyright (1993).
[15] WIPO Guidelines (2003) (n 4) 11.
[16] ibid 9-25.

to national economies and for this reason are the preferred methodology which will be adopted in this study.

Copyright industries classifications

Most reports classify copyright industries in a number of ways, in order to distinguish between those industries that rely entirely on copyright, and those that are not as dependent on copyright. The WIPO guidelines categorises copyright industries into four classifications – core copyright industries, interdependent copyright industries, partial copyright industries, and non-dedicated support industries.[17]

Core

The definition of core copyright industries is relatively clear –

> The core copyright industries are industries that are wholly engaged in creation, production and manufacturing, performance, broadcast, communication and exhibition, or distribution and sales of works and other protected subject matter.[18]

The separation of production and distribution, especially for certain industries (eg newspapers), would be onerous, and is not recommended. The list of core copyright industries given in the guidelines themselves is as follows:

a) press and literature;
b) music, theatrical productions, operas;
c) motion picture and video;
d) radio and television;
e) photography;
f) software and databases;
g) visual and graphic arts;
h) advertising services; and
i) copyright collective management societies[19]

Within these eight groups, there are then further classifications that allow us to delve deeper into the practical details of these groups. As the focus of the thesis is publishing, the most relevant group here is press and literature, thus it is worth including the breakdown here:

[17] ibid 26-35.
[18] ibid 29.
[19] ibid 28.

- authors, writers, translators;
- newspapers;
- news and feature agencies;
- magazines/periodicals;
- book publishing,
- cards and maps;
- directories and other published materials;
- pre-press, printing, and post-press of books, magazines, newspapers,
- advertising materials;
- wholesale and retail of press and literature (book stores, newsstands); and
- libraries[20]

Collective management organisations (CMOs) constitute a separate section of the core copyright industries (section i). There is no breakdown of these, most likely because there is very little that could be done to break down CMOs any further. There is, however, a note that it does not include turnover – this is to prevent double counting, as turnover would be accounted for in their relevant sectors.[21]

Interdependent

The interdependent copyright industries must be defined in relation to the core copyright industries. However, the report chooses not to refer to them as non-core, as this would diminish the two-way communication between core and interdependent copyright industries that allows both to thrive. The definition offered by the guidelines is:

> Interdependent copyright industries are industries that are engaged in production, manufacture and sale of equipment whose function is wholly or primarily to facilitate the creation, production or use of works and other protected subject matter.[22]

This is then further subdivided into core and partial interdependent copyright industries, with core including manufacture, wholesale and retail of 'TV sets, Radios, VCRs, CD Players, DVD Players, Cassette Players, Electronic Game equipment, and other similar equipment; computers and equipment; and musical instruments.' Partial interdependent copyright industries then refer to manufacture, wholesale and retail of 'photographic and cinematographic instruments;

[20] ibid 30.
[21] ibid 31.
[22] ibid 33.

photocopiers; blank recording material; and paper."[23] The classification of interdependent copyright industries is straightforward – those industries that do not create copyright works, but support, display, distribute or store them, and thus are inextricably linked with the core copyright industries.

Partial

The partial copyright industries do just what they say on the tin – they are industries resting partially on the copyright of their creations. The definition offered in the WIPO guidelines states that

> [t]he partial copyright industries are industries in which a portion of the activities is related to works and other protected subject matter and may involve creation, production and manufacturing, performance, broadcast, communication and exhibition or distribution and sales.[24]

The guidelines also give a list of industries included in this definition:

- apparel, textiles and footwear;
- jewellery and coins;
- other crafts;
- furniture;
- household goods, china and glass;
- wall coverings and carpets;
- toys and games;
- architecture, engineering, surveying;
- interior design; and
- museums[25]

The full list given in the guidelines is designed to be exhaustive – it was specifically chosen not to expand it beyond the industries specifically listed therein.

[23] ibid.
[24] ibid 33.
[25] ibid 34.

Non-Dedicated Support

The definition offered by the WIPO guidelines as to what constitutes the non-dedicated support industries is as follows:

> [t]he non-dedicated support industries are industries in which a portion of the activities is related to facilitating broadcast, communication, distribution or sales of works and other protected subject matter, and whose activities have not been included in the core copyright industries.[26]

Once again, it is a relatively non-controversial and clear definition, and includes retail, wholesale, transportation, and the internet. The link is relatively clear – without sales and distribution channels, copyright industries would have far more difficulty even existing, let alone thriving the way they do now.

Recommended Framework of the Study

The WIPO guidelines state that three things are frequently measured in copyright studies – size of the copyright-based industries as a percentage of GDP, employment, and foreign trade. The guidelines also give instructions on how to obtain information on gross value added (GVA) of particular sectors, which comprises their contribution to GDP. They also point out that, while most data should be available through public accounts, there are sectors and scenarios in which data may have to be obtained by the researcher, through communication with private industry, surveys and other data collection methods. This is important to note when considering comparing results between different countries, as the reliability of privately collected data may not be as watertight as that of public accounts.[27]

The guidelines provided by WIPO are thorough and comprehensive, and outline a solid structure for creating a study that can be compared with other countries without much difficulty. There are some weaknesses associated with them, notably their age, and their classification of industries into the ISIC Rev 3.1 classifications, but they provide extensive and well-researched guidelines to assess the economic contribution of copyright industries to an economy. They have been used to

[26] ibid 35.
[27] ibid 36-43.

implement studies in no fewer than 41 separate countries[28] – a broad range of countries against which a UK study could be compared. These studies have been carried out by multiple countries and in multiple years, stretching from the introduction of the guidelines in 2002 up to 2014. This allows WIPO to publish aggregate and comparative reports which use the latest data available, not just from the '00s but also from the '10s into the teens, meaning that data can be more easily compared without fear of factors such as the global economic crisis and relative differences in publication dates leading to incongruences in the comparisons.[29]

The guidelines offer a structured approach with which to measure the contribution of the copyright-based industries to the economy. For example, taking the measurement of a percentage of GDP, the guidelines provide three alternatives:

> The relative size of the copyright-based industries can be measured in three ways as a percentage of GDP, namely through:
>
> (1) output or production – where the GDP is viewed as the difference between output and intermediate consumption, ie, the sum of the value added of all industries, firms or establishments, and is compared to the value added of the copyright-based industries. This is the standard way employed in the past surveys on the copyright-based industries;
>
> (2) expenditure – whereby GDP is viewed as the sum of all expenditure categories – personal consumption, gross private domestic investment government purchases, and net exports – and is compared to the sum of all copyright-related expenditure categories; and
>
> (3) income – whereby GDP is the sum total of payments to factors of production organized by companies (primarily labor and capital), and would be compared to the sum of compensation paid to copyright-related labor (ie, compensation to employees through wages and salaries, bonuses and other benefits) plus copyright-related profits that accrue to firms.[30]

---

[28] WIPO, 'WIPO Studies on the Economic Contribution of the Copyright Industries: Overview' (2014) <http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf> accessed 17 December 2015.
[29] ibid; earlier versions were also made available; it is updated on a regular basis.
[30] WIPO Guidelines (2003) (n 4) 37-38.

The guidelines were the source of the breakdown of copyright industries into core, partial, interdependent and non-dedicated support industries. For the purposes of this chapter, a study was conducted of the core copyright industries in the UK in 2010-2012.

Framework of Thesis Study

The study conducted for this chapter was based on the WIPO guidelines. Thus, as the WIPO guidelines appendix contains a list of the core copyright industries, together with ISIC Revision 3.1 classification codes, this was the starting point for identifying the industries to be included in the study. ISIC is a United Nations Statistical Classification – that is to say, it identifies industries by issuing codes to particular industries, which allows them to be identified internationally. It is the International Standard Industrial Classification of All Economic Activities.[31] At the time of publication of the WIPO 2003 Guidelines, the current version of ISIC was rev. 3.1. Due to the passage of time between the publication of the WIPO Guidelines and the study conducted here, the ISIC had since been revised, becoming ISIC rev. 4.[32]

Data was taken from the UK Annual Business Survey (ABS), which is administered by the UK Office of National Statistics, and collects information on the UK's non-financial business economy.[33] Unfortunately, when published in the ABS, the data used for this study does not use ISIC codes, but rather UK Standard Industrial Classifications (UK SIC). There is a direct correlation between the four-digit ISIC codes and the UK SIC codes, with the first two digits always being the same, allowing for some degree of comparison.

A third classification standard, NACE, however, has a direct correlation with the UK SIC. These two codes have a correlation to the four-digit level. NACE is a European standard classification of economic activities.[34] While UK SIC does have some five-digit classifications, these are always

---

[31] United Nations Statistics Division, 'Detailed Structure and Explanatory Notes: ISIC Rev 3.1' (*United Nations Statistics Division*) <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=17> accessed 17 December 2015.

[32] United Nations Statistics Division, 'Detailed Structure and Explanatory Notes: ISIC Rev 4.0' (*United Nations Statistics Division*, 2008) <http://unstats.un.org/unsd/cr/registry/isic-4.asp> accessed 17 December 2015.

[33] Office for National Statistics, 'Annual Business Survey' (*Office for National Statistics*) <http://www.ons.gov.uk/ons/rel/abs/annual-business-survey/index.html> accessed 17 December 2015.

[34] Statistical classification of economic activities in the European Community, with the acronym taken from the French Nomenclature statistique des activités économiques dans la Communauté européenne. Eurostat, 'Glossary: Statistical classification of economic activities in the European Community (NACE)' (*Eurostat: Statistics Explained*) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Statistical_classification_of_economic_activities_in_the_European_Community_(NACE)> accessed 17 December 2015.

within the four-digit matched codes. This then makes the conversion a multi-step process, from the WIPO-recommended ISIC 3.1 to the UK SIC 2007 codes that were in use in 2010-2012.

For the purposes of the study conducted in this research project, in order to ensure that an accurate list was maintained, the code comparison was undertaken in three different ways.

The first of these was to use the UN correspondence codes for the ISIC Rev. 3.1 to ISIC Rev 4.0. These ISIC 4.0 codes were then compared to the UN correspondence codes for the NACE 2.0 classification system. This was then compared to the UK SIC 2007.

The second method took the opposite path – ISIC 3.1 codes were converted to NACE 1.0 (equivalent to the UK SIC 2003 codes). These were then directly converted to UK SIC 2007 codes. The two lists of codes were then compared and crosschecked.

The third method was a manual checking of the ISIC Rev 3.1 codes against UK SIC 2007, which was used to ensure that nothing had been missed.

The three lists of UK SIC 2007 codes were then compared and merged to form one master list, ensuring that nothing essential was omitted, nor was anything extraneous included.[35]

There were several difficulties encountered in compiling this list – firstly, while NACE and ISIC codes are congruent to the two-digit level, the difference between two- and four-digit identifier codes can be substantial, with a four-digit identifier comprising anything from a single percentage of the two-digit parent category up to the majority. Furthermore, even the five-digit codes used in the 2012 Annual Business Survey may, at times, not be specific enough to accurately assess the proportion of the code that falls under the scope of the core copyright industries. The triple verification of relevant categories mentioned above was employed as a method to counteract the difficulties in converting from UK SIC to ISIC. Furthermore, in order to avoid counting an entire category where only a tiny proportion was relevant, codes in which only a portion were relevant were omitted. Lastly, there were some specific categories where data had been suppressed to avoid disclosure. Although the elimination of certain sectors leads to some regrettable under-counting, this was considered preferable to over-estimating the contribution of the core copyright industries. The ABS provides approximate gross value added at basic prices (aGVA), thus the figures provided therein were lifted directly for the purposes of inclusion in the study.

[35] Appendix I.

Results

The method described above was used in order to obtain figures for the years 2010- 2012. Thus, a comparison can be made between the years. Furthermore, WIPO publishes collective data from the countries which produce reports under the protocols discussed above, allowing for easy comparison between countries. Thus, using the WIPO framework allows for comparison not only with previous years of UK industry figures but also with other WIPO countries for the same period. WIPO publishes collective economic analyses on a regular basis. For the purposes of comparison, this study uses the January 2014 release[36] The WIPO comparison documents analyse the data produced by WIPO studies in a variety of interesting ways, of which several can be adapted to include the study conducted for this paper.

Firstly, and most basically, the study conducted for this chapter gave a total value of £86,480 million for the core copyright industries in 2012. As a percentage of GDP, this stood at 6.25% in 2012. This was an increase of 0.8% on the 2011 figure of 6.17%, using the same study framework. In each year, certain figures were not available in the ABS, whether for the purposes of avoiding disclosure, or because the figures were not available, thus the different years are not entirely congruent, but the difference is small – even this limited assessment shows not only that the core copyright industries were a vital part of the UK economy (more than a twentieth of total GDP), but also that they were growing year-on-year. Although the figures for all copyright industries (core and non-core) in the WIPO collected results show that core copyright industries accounted for roughly 50% of all copyright industries, the EPO/OHIM report, discussed later in this chapter, showed that the core copyright industries in the UK were roughly 75% of total copyright income. Adapting this to the UK figures obtained here, the total contribution of copyright industries to GDP could be anywhere from 8.3% to 12.5% of UK GDP.

In using the study conducted for this chapter, one can see that the percentage contribution to GDP of the core copyright industries was increasing year-on-year.

[36] WIPO Overview (n 28).

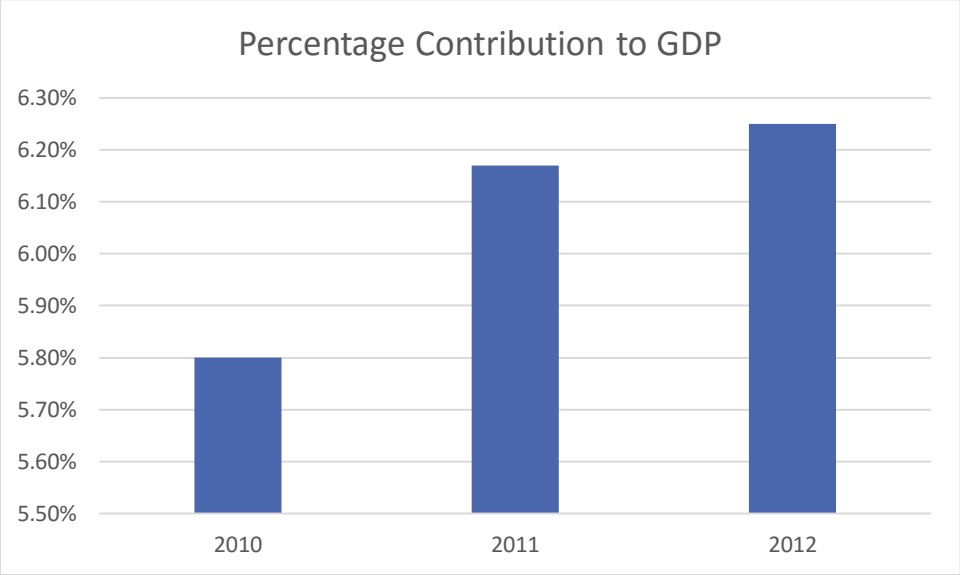


Figure 1: Percentage Contribution to GDP

The breakdown of GDP can be effected in several ways – the simplest being by industrial code. Through this, one may observe the growth and shrinkage of different industries in the distribution of the core copyright industries, and compare them over the course of the three years studied. From the three charts in figure 2: Percentage of GDP by Industrial Codes 2010-2012, we can see that there was a change of less than 1% in all three years – the distribution remained almost entirely the same. This is surprising, especially in terms of print and publishing activities.

It is clear from all three graphs in figure 2 that computer programming and related activities were a vital part of the core copyright industries' contribution to UK GDP, standing at 45% in 2012. However, it is important also not to deny the contribution made by the print industries, which were holding steady at 12-13% of core copyright industry contributions.

Figure 2: Percentage of GDP by Industrial Codes 2010-2012 represents percentage of GDP by industrial code – this is different to the classification offered in the WIPO framework due to the interaction of SIC codes and different categories from the WIPO classifications. It must be noted that by creating graphs using SIC codes certain aspects of different creative industries are merged – for example, category 90 encompasses literary, artistic and other forms of creation. This is a necessary function of the data collection performed for this chapter, as further breakdown of information into different categories was not available. However, it makes it more difficult to compare with the WIPO collected results. An alternative to this will be discussed in the DCMS Industry Estimates section.

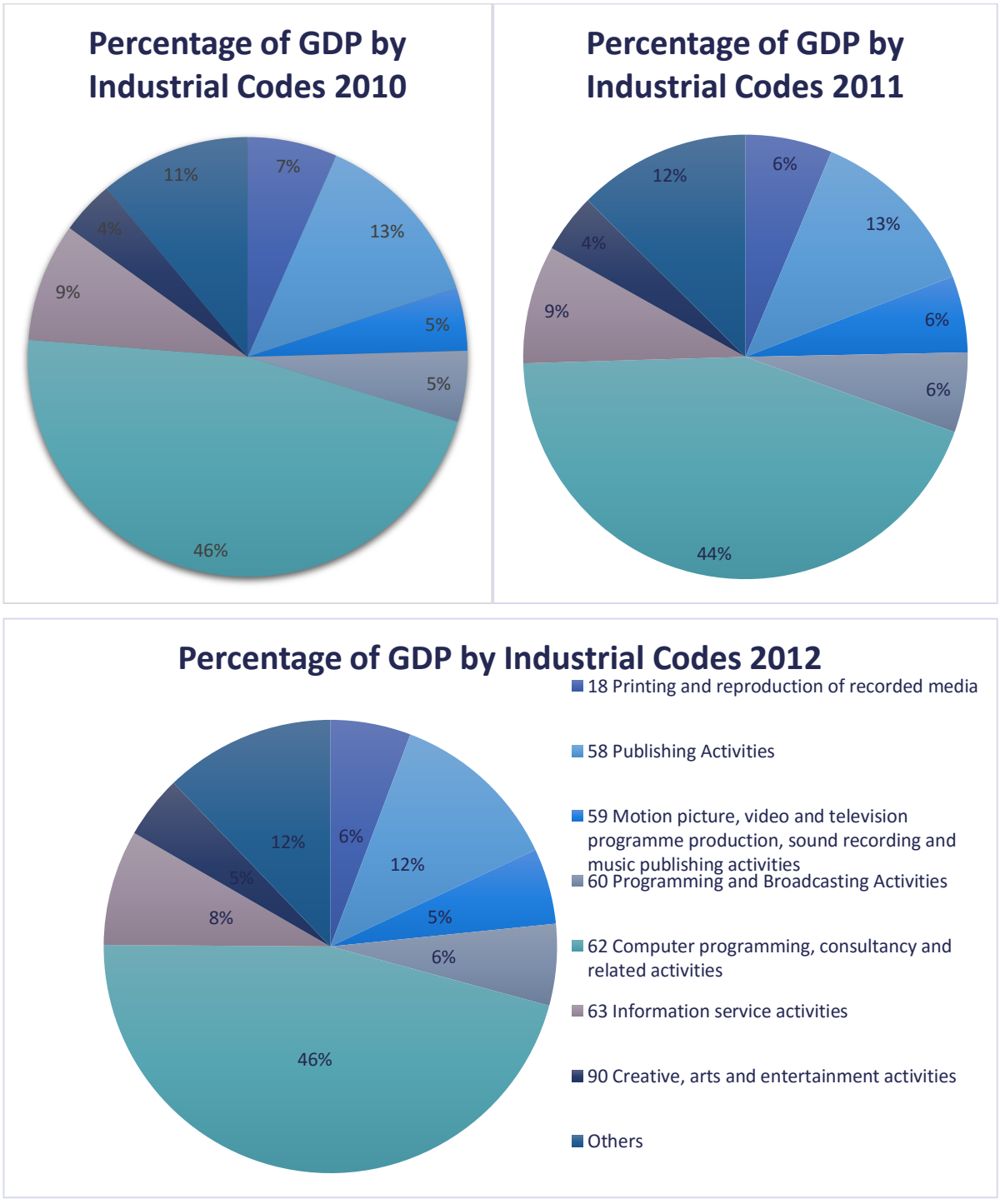


Figure 2 Percentage of GDP by Industrial Codes 2010-2012

Although in some ways it is not an ideal method of assessment, the use of the WIPO guidelines allows for easier comparison with other countries using the same framework. International comparability is an important part of any assessment – knowing what proportion of the UK economy relied on copyright industries becomes even more powerful when we can also compare what proportion of other economies relied on the same frameworks.

Comparisons to other Countries

The use of WIPO guidelines on economic contribution analysis allows data to be compared with similar WIPO studies conducted around the world. Even more helpful is the fact that WIPO collects the data from studies into a single document.[37] The version discussed here is built on data from 42 different national studies, from a variety of different countries around the world, including developed and developing countries. As the UK did not at the time produce a WIPO-compliant study, only certain parts of the overview could be directly compared with the original data analysis completed for this thesis, but nonetheless, this comparison can be beneficial, allowing for discussion of what data has been collected and assessed.

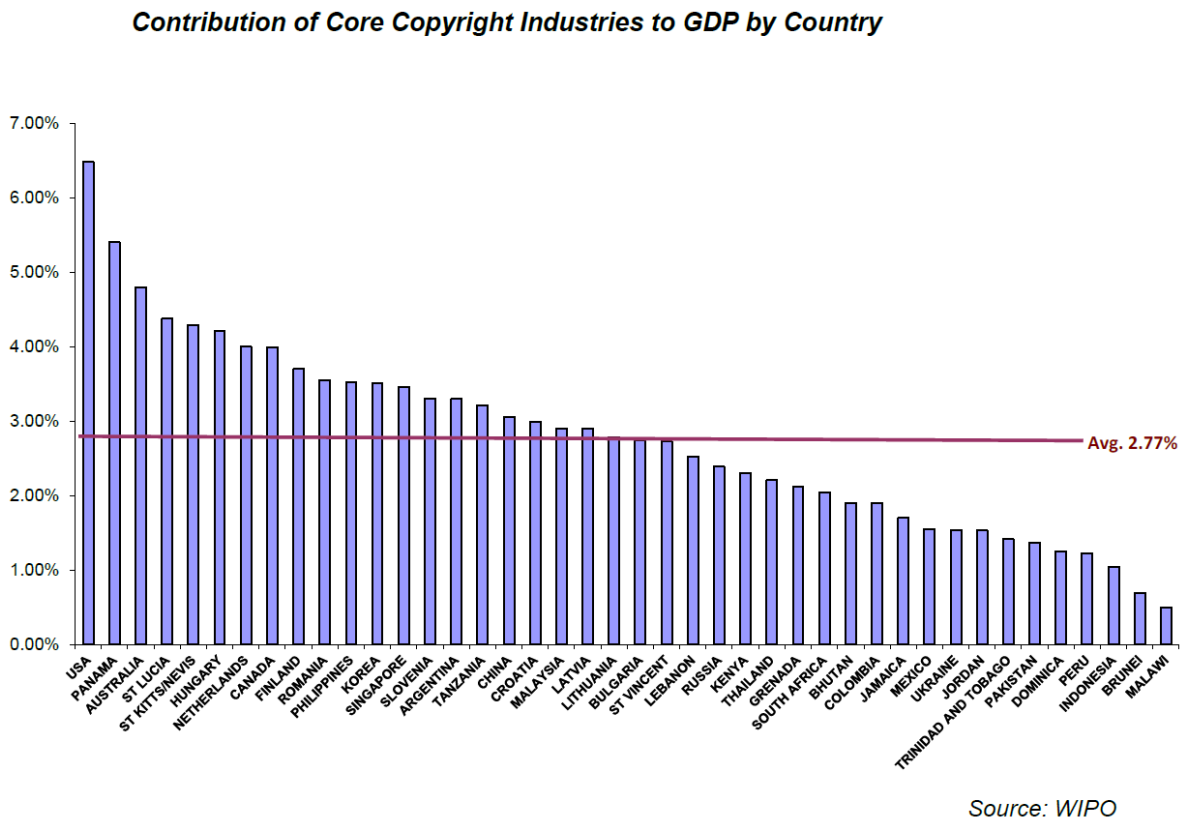


Figure 3: Contribution of Core Copyright Industries to GDP by Country

The graph above in figure 3, which is taken directly from the WIPO comparison document,[38] compares the contribution of the core copyright industries to GDP in 2012 of the 42 studies collected, with the US sitting in the left-most position, with a contribution of 6.48%. The graph also contains an average (mean) line, which shows that the mean contribution of core copyright

[37] ibid.
[38] ibid 15.

industries to GDP was 2.77%. If we re-form this graph to include the UK figures (figure 4), we can see that the UK sits very firmly above the average, and tends greatly towards the higher end of the graph. Figure 4 contains two average lines, one which matches the graph in figure 3, and another which recalculates the mean with the inclusion of the UK's core copyright contributions. Falling into place behind only the US in terms of percentage contribution to GDP, the UK's creative industries were at the time one of the strongest contributors to a national economy among the studies conducted through the WIPO framework. Given, however, that the WIPO studies looked at only a select number of countries, this information must be taken into account as part of a selection of countries which did not all have a similar economic structure to the UK. A comparison with other EU countries along similar lines can be seen later in this chapter.

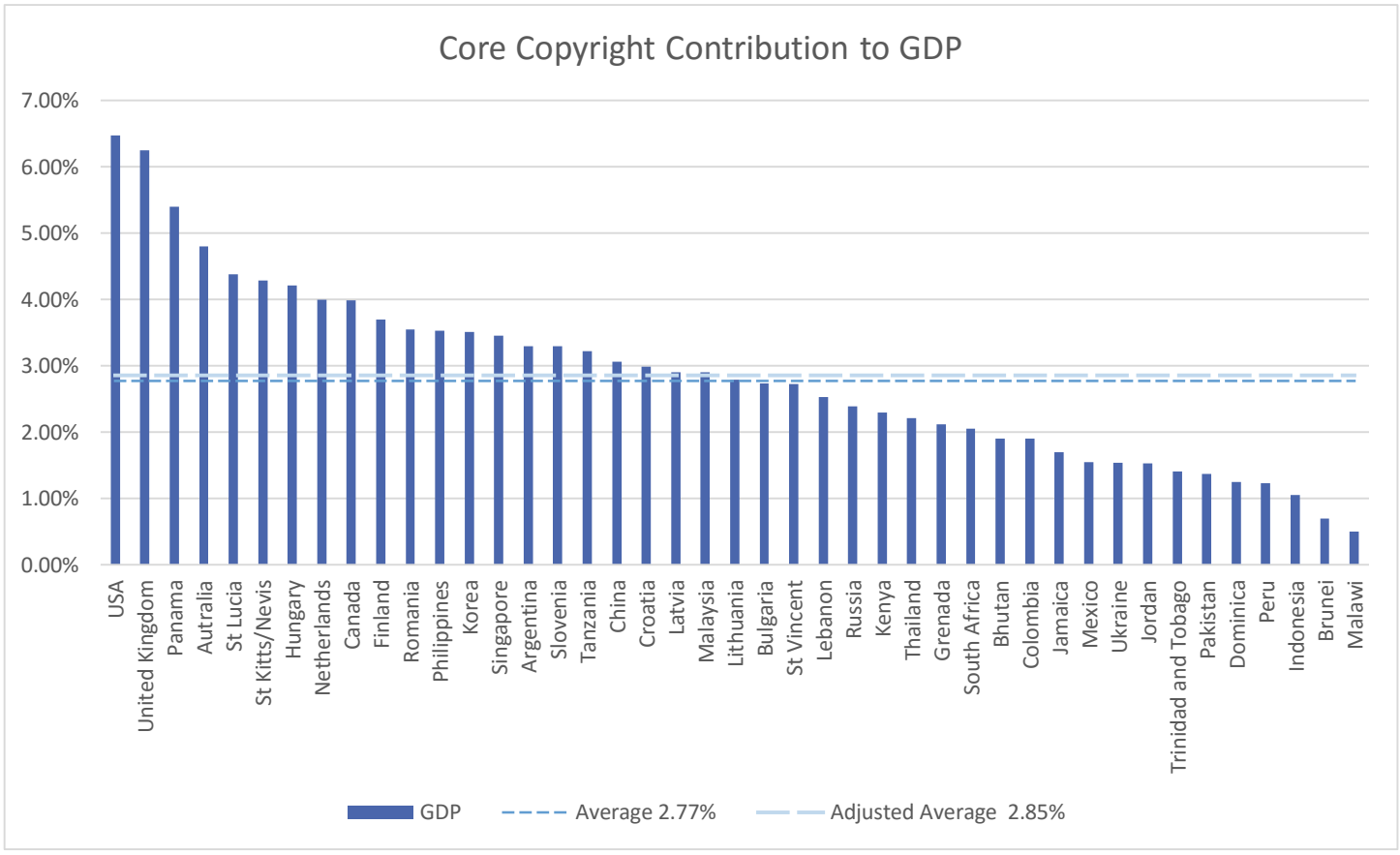


Figure 4: Core Copyright Contribution to GDP

There are certainly limitations to the WIPO methodology, but it is still a comparison which allows us to see that the UK is very strong in terms of copyright contribution to GDP, and thus this should serve as a reason to carefully consider anything which would change the landscape of copyright industries – research into whether and how certain changes would impact on GDP contribution as well as employment should be conducted and verified before any changes are made.

Other Research

Copyright has been studied from an economic perspective for many years – Arnold Plant's study in the 1930s is just one early example of this.[39] Plant did not stand alone, with much other journal and textbook literature available on the economics of copyright and other IPRs.[40] Considering copyright as an economic force allows us to synthesise the value of industries that are concerned mostly or wholly with copyright, and estimate the contribution of those industries to economic performance indicators such as GDP, employment and trade. In 2009-2015, much research was conducted on the economic impact of the copyright industries. However, there was less research done on how changes to copyright legislation may affect this economic impact. Copyright research was not isolated to the UK, with many countries producing WIPO-guideline-compliant reports, as discussed above. There was also a variety of other reports on the economic contribution of various sectors, including publishing, digital books and the media and content industries. This section of this chapter will concentrate on the research from the late '00s and early '10s which discussed the impact of digital on and possible future development of the media and content industries, and consider how their combined information could help us to paint a picture of the contribution of the publishing and printing industries to the UK economy in those years. It will also point out some gaps in the research, and make recommendations for what other research should be conducted before copyright legislation is further modified.

Hargreaves Impact Assessments and Oxford Economics Report

As mentioned earlier in this thesis,[41] 2011 was the date of Professor Ian Hargreaves' assessment of intellectual property growth in the UK.[42] As part of the supporting documentation of the Hargreaves Review, several economic impact assessments (IA) were published.[43] These assessed the potential cost saving and growth impact, per annum, of each of Hargreaves' recommendations. For many of the proposed copyright exceptions these savings and growth were stated as 'social innovation' or 'not quantified'.[44]

---

[39] Arnold Plant, 'The Economic Aspects of Copyright in Books' (1934) 1(2) Economica New Series 167.
[40] See, for example, William Landes and Richard Posner, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003); Richard A Posner, 'Intellectual property: the Law and Economics Approach' (2005) 19(2) Journal of Economic Perspectives 57.
[41] The Hargreaves Review is discussed many times throughout the thesis. See, for example, the Literature Review.
[42] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011).
[43] IPO, 'Supporting document EE: Economic Impact of Recommendations' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-doc-ee.pdf> accessed 27 November 2014.
[44] ibid 3.

The quality of these IAs has been subject to some criticism, including by the Oxford Economics Consultation on Copyright: Comments on Economic Impacts.[45] This report, which was commissioned by the Alliance against IP Theft (now known as the Alliance for Intellectual Property), analysed the IAs published in support of the Hargreaves Review and pointed out several ways in which the IAs made unsupportable conclusions. The Oxford Economics report pointed out a variety of issues, including lack of net costing,[46] faulty assumptions about market size,[47] and selection of alternatives where maintenance of the status quo would be more logically beneficial.[48]

The report concluded by stating that further research was needed before changes could be made, as economic legislation should be based on robust economic research. It also recommended that the status quo be maintained in situations where no convincing evidence could be offered as to the benefits of legislative change. This more cautious approach to copyright legislation was mirrored in the Pricewaterhouse Cooper reports commissioned by a member of the Alliance for IP, the Copyright Licensing Agency which are discussed infra.

Despite the advocacy for caution, the impact assessments in the Hargreaves Review were used to back up several changes in legislation – even as far as the IPO's annual report in 2014,[49] and the same figures were used to estimate the potential for growth in the economy. They also supported the private copying exception which was quashed less than 12 months after implementation.[50]

Pricewaterhouse Cooper Reports 2011 and 2012

In 2011 and 2012, in response to the movement towards exceptions to copyright law, the Copyright Licensing Agency (CLA) commissioned Pricewaterhouse Cooper (PwC) to produce two studies that considered the economics of copyright, secondary copyright, collective licensing and education exceptions. These two reports, An Economic Analysis of Copyright, Secondary Copyright and Collective Licensing[51] and An Economic Analysis of Education Exceptions in Copyright,[52] were prepared as part of the CLA's response to the Hargreaves Review and its recommendations for copyright exceptions.

---

[45] Oxford Economics, 'Consultation on Copyright: Comments on Economic Impacts' (2011).
[46] ibid 11.
[47] ibid 13.
[48] ibid 26.
[49] IPO, 'Supporting Innovation and Growth: a report on the work of the IPO 2013/14' (2014), 15.
[50] This is more fully discussed in Chapter 6.
[51] Pricewaterhouse Cooper, 'An Economic Analysis of Copyright, Secondary Copyright and Collective Licensing' (2011).
[52] Pricewaterhouse Cooper, 'An Economic Analysis of Education Exceptions in Copyright' (2012).

The first report considered the economic rationale for copyright, in that it acts as an incentive to create content – copyright needs to walk the fine line of finding a balance between incentivising creators to continue producing content and allowing potential consumers access to that content. This, however, is not as easy as one might think – as such a balance can be a fragile equilibrium which maximises both consumer welfare and creator incentives. Without one, of course, the other could not continue.

The report analysed the contribution of the core and dependent sectors in the UK, and suggested that they were the largest in Europe, following the WIPO classification guidelines, at 8.4% of GDP.[53] It also pointed out the need for further research on the incentive effects of copyright on creators and the scale and value of orphan works. It stressed that these gaps needed to be filled before policy decisions were made.[54]

The following year, in 2012, the second CLA-commissioned PwC report was published. This focused on the economic impact of the proposed educational exceptions put forward by the Hargreaves Review. It analysed not only the economics of the educational publishing sector, but also the role of copyright in that sector. This is something that many other economic analyses fail to do, often by virtue of the difficulty of disentangling the impact of copyright legislation from the underlying business structures, but it is particularly relevant for educational publishing. Unlike many artistic and creative forms of copyright, educational publishing is less likely to be created as art for art's sake, and is thus a good test area to investigate the impact of copyright legislation on willingness to publish. The report found that some 54% of the members of the ALCS who are the highest-earners of CLA income, considered secondary licensing and collective licensing (both of which rely on the copyright law framework) to be 'essential' and a further 36% indicated that it was 'important'. For almost 25% of those authors, this represented more than 60% of their income.[55]

These two reports, which the CLA submitted to government, counselled of the need for caution before implementing copyright reforms or exceptions, stating that there was a need for greater economic research into the impact of potential exceptions. Ultimately, however, this was not the

[53] PwC, An Economic Analysis of Copyright, Secondary Copyright and Collective Licensing (n 51) 20.
[54] ibid 6.
[55] PwC, Education Exceptions (n 52) 2.

case, and all of the Hargreaves exceptions were implemented in 2014.[56] Two of those exceptions are discussed in more detail in the next chapter.

Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries

The Joint Research Council (JRC), the European Commission's in-house science service, employs scientists to provide independent advice and support to EU policy. As a part of this, under the heading of Information and Communication technology, the JRC conducted a quantitative overview in 2011 of the media and content industries (MCI). Published in 2012, the survey was titled 'Statistical, ecosystems and competitiveness analysis of the media and content industries.'[57] It was composed of a quantitative overview and several sector analyses, including the film sector, music industry, newspaper publishing industry, and book publishing industry.[58] All the reports were based on both official (OECD and Eurostat) and non-official data sources, giving great scope to the analysis within.[59] It is worth noting that this particular study as concerned with the media and content industries, rather than copyright industries, meaning that information and communication technologies were excluded, as they were subject to their own set of reports. It is also important to note that copyright and copyright legislation was not within the ambit of these reports, and thus they did not quantify the impact of copyright legislation on the industries concerned. The reports produced a profile of the media and content industries for the EU27, the US, Japan, India, and China. The two sub-reports in this series relevant to this thesis on a greater scale – on the newspaper publishing industry and the book publishing industry – each also produced a comprehensive investigation of their relative industries.

The report in general produced some interesting facts for consideration – such as the fact that the UK was one of the largest markets in the EU27, based on value added, being in the top six for all subsectors.[60] It also pointed out that, across the EU, publishing of newspapers was the largest publishing sector, followed by publishing of journals and periodicals. This did not hold true for

---

[56] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372; The Copyright and Rights in Performances (Disability) Regulations 2014, SI 2014/1384; The Copyright (Public Administration) Regulations 2014, SI 2014/1385; The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361.
[57] Andra Leurdijk and others, 'Statistical, ecosystems and competitiveness analysis of the media and content industries' (2012).
[58] ibid 18
[59] ibid 5.
[60] ibid 7.

newer EU Member States though, where books held a higher share of publishing than journals and periodicals.[61] Similar to the aforementioned educational publishing report, newspapers were not art published for art's sake, and relied heavily on copyright to provide financial incentives.

The Book Publishing Industry

Moving on to the book publishing sector, this 2012 report, authored by Jean Paul Simon and Giuditta de Prato,[62] broke down the global and European book market by sector, country and type, while analysing its contribution to turnover and employment. The data included in the report covered the period up to 2009, with forecasts being made as far as 2015. It discussed the appearance and impact of digital also, especially the advent of large players like Apple and Google. Parts of the report have become outdated, even in the relatively short time since its publication, including its reference to the Google Books case between publishers and Google.[63] The rapid development of digital in the early 2010s led to the rapid obsolescence of much research, and this applies in part to this report. However, it is still useful to provide certain facts, such as the fact that, in 2009, the publishing sector accounted for just under 8% of media and content industries total revenue, at US$109 billion.[64] Furthermore, it also noted that book publishing was one of the only industries in which the EU outranked the US, a fact which had remained true for several years.[65] However, the report also noted that the US was flourishing in terms of ebook sales, with 57% of global sales in the US.[66] It also offered specific statistics on the UK, stating that the UK had 1.5% of the total ebook market in 2009, selling an estimated 763 million books in 2009.[67]

The report concluded by offering a summary – the new players in the book market, including Amazon, Google, and Apple, caused a power struggle in the book industry. It also suggested that digital and print book industries operated on different logics: economics of production in the case of printed books, and economics of distribution for ebooks.[68] The report suggested that harmonisation at EU level would help to smooth out these differences and ease the transition into

[61] ibid 7.
[62] Jean Paul Simon and Giuditta de Prato, 'Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Book Publishing Industry' (2012).
[63] ibid 76.
[64] ibid 25.
[65] ibid 28.
[66] ibid 28.
[67] ibid 52.
[68] ibid 89.

the digital world.[69] This suggestion was taken on board at a European level, with copyright harmonisation being a priority for the Digital Single Market strategy.[70]

The Newspaper Industry

The subsidiary report for the statistical, ecosystems and competitiveness analysis of the media and content industries newspaper industry report was authored by Andra Leurdijk, Mijke Slot and Ottilie Nieuwenhuis.[71] It put forward the idea that the newspaper industry, more than the book industry, had been hit by the move to digital.[72] While Europe's was the largest print newspaper industry in the world in 2009, newspaper industries across the EU27 had shown a steady decline since the 1990s.[73] The total average circulation per day in Europe dropped by 11 million in the four years from 2005 to 2009 – from 85 million average to 74 million average.[74] News consumption was and still is consistently threatened by newcomers to the arena – from radio and television to online news. It is the latter, however, which had the greatest effect on traditional print newspapers. While the majority of people aged 25-65 got their news from television, younger people (14-24) turned to the internet for news.[75] Advertising revenue on the internet was in 2009 the fastest-growing advertising segment, which was consequently also affecting newspaper advertising revenues.[76]

The report considered how traditional newspapers adapted to new challenges, including moving to online, changing format, introducing new sections and magazines, including weekend magazines, offering tie-in exploitation of brand name and integrating more strongly with their commercial possibilities. Legacy broadcasting and newspaper websites remained among the most visited news providers online. Newspapers had also embraced the idea of news apps on tablets and smartphones.[77]

There were, however, some concerns about the quality of output. While consumers benefit from increased availability of 'free' news and the option to tailor news to their preferences, vulnerable

---

[69] ibid 92.
[70] Commission, 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen' (Press Release, 6 May 2015).
[71] Andra Leurdijk, Mijke Slot, and Ottilie Nieuwenhuis, 'Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry' (2012).
[72] ibid 53.
[73] ibid 31.
[74] ibid 31-35
[75] ibid 42.
[76] ibid 62.
[77] ibid 53-68.

news areas, such as investigative journalism and local news, may suffer or struggle to survive.[78] While the US had some success with crowd funding and sponsorship, this had not been easily replicated in Europe.[79]

Measurements of economic health of the newspaper industry in Europe showed a decline in circulation and employment, although not as steeply in the US. It was suffering more than the major Asian markets (Japan and China) though. Language and cultural differences mean that a single European market seems unlikely, which in turn means that intra-European trade will likely continue to be only a niche market catering for business people, expats, etc.[80]

According to the report, newspapers were undergoing a transitional period, in which they were forced to adapt to new business models as their legacy business declines. New players entered the market, from news aggregators like Yahoo! News and Google News to online-only content creators, and they were able to adapt faster than legacy newspapers, which still needed to support their traditional business models. Consumer behaviour changed, and advertising revenues declined for legacy newspaper printing. However, there was still not sufficient data to comprehensively assess that transformation and its subsequent effects, and thus more data is required in order to understand 'whether journalism will be able to continue to fulfil its democratic functions."[81]

Rüdiger Wischenbart

Rüdiger Wischenbart, a content and consulting firm based in Austria, is responsible for the annual publication of the Global eBook Report. The organisation specialises in publishing and international markets and is responsible for not only the Global eBook Report but also a statistical survey of publishing markets for the International Publishers Association (IPA), and the Global Ranking of the Publishing Industry. The Global eBook Report, authored by the titular consultant, in combination with Carlo Carrenho (Brazil), Javier Celaya (Spain), Veronika Licher (China), Miha Kovac (Central and East Europe), and Vinutha Mallya (India), which was first presented at the Frankfurt Tools of Change conference in 2011, is updated twice yearly with new data and discussion. The report attempted to map and understand developments in global ebook markets using actual data (not predictions) from a variety of sources and backed up by expert interviews.[82]

---

[78] ibid 57.
[79] ibid 66.
[80] ibid 78-79.
[81] ibid 11.
[82] Rüdiger Wischenbart and others, 'Global eBook: A report on market trends and developments. Update fall 2014' (2014).

The Spring[83] and Fall[84] 2014 updates of the report focused particularly on the European, US, and UK markets, pointing out especially that Germany was ahead of most of Europe in terms of embracing digital trade ebooks, but still lagged behind the US and the UK.[85] The report covered all aspects of the digital ebook market, from the impact of new digital players such as Amazon and Apple to the shifting landscape of legacy print publishers, most notably the merger of Penguin and Random House and how that affected the publishing arena. There were also commentaries on ebook pricing strategies, the divergence between ebook and print book bestseller lists and how infrastructure affected the development of ebook industries – far easier, certainly, to download an Amazon app than to build a network of bookstores.

An interesting point raised by the report was that self-publishers, if taken as a single publishing entity, published more titles in 2013 than any established publishing house.[86] The US self-publishing market at that point was estimated at around 11% of total ebook market value, according to Wischenbart, with UK self-publishers holding some 12% of all ebook sales.[87]

The report also considered flat rate subscription services, a 'Netflix for books' idea which had appeared in the previous few years. It gave a short overview of the different subscription models which are available around the world, from Scribd's branding as a 'personal digital library' to Amazon Prime's bundling of ebook lending with other premium content and expedited delivery of purchases. The subscription costs for all of the services discussed (eleven in total) were extremely low, at around $10/€10 per month – this then would make it challenging for publishers to earn revenues to support themselves.[88] The relative youth of those developments meant that the report could not assess their future impact, but it is worth noting that the variety of subscription services and their popularity for other media formats meant that it seemed likely that they would be here for some time yet.

Wischenbart, the lead author on the Global eBook Report, also presented a White Paper at the Frankfurt Book Fair 2014, as part of a panel on publishing trends and statistics.[89] This White Paper

---

[83] ibid.
[84] ibid.
[85] ibid 31-34.
[86] ibid 107.
[87] ibid 108.
[88] ibid 111-115.
[89] Rüdiger Wischenbart, 'Global Trends in Publishing 2014: An overview of current developments and driving forces in the transformation of the international publishing industry' (Frankfurt Book Fair, 7-12 October 2014) <http://www.pik.org.pl/upload/files/Global_Trends_in_Publishing_2014.pdf> accessed 7 January 2016.

differed from the previously discussed Global eBook Report in that it did not focus solely on ebooks, but instead considered publishing as a whole. The statistics it presented were comprehensive and painted a picture of an industry that had been affected by the shift to digital and thus underwent a transformation.[90] However, it is important to note that such transformation is affected significantly by regional differences. While global players and international consolidation both played a role in the transformation of the publishing industry, the presence or absence of those things in particular territories could have a significant effect. For economies with a growing middle class, such as China, India and Brazil, it stated, publishers could cater to the rising demand for culture and entertainment that appears along with this emerging middle class.[91] Furthermore, while the decline in print seems inevitable, a reluctance to embrace digital (as can be seen in the case of France[92]) may ultimately be detrimental to what was one of the strongest publishing industries in Europe.

The White Paper concluded by offering the suggestion that the publishing industry may become more and more difficult to define as a single separate cultural sector as the demand for culture, entertainment and media grows and merges through the increased availability of subscription-based content streaming.[93] One important point offered, though, is that the change to digital and the shifting of cultural norms is not something which will happen in the future – it was happening now, here, and in the present, every day around us.[94] This point remains true even into 2015 and 2016 – the changes in copyright do not cease at the end of a PhD research period, and will continue to occur for the foreseeable future.

PA Statistics Yearbook

The Publishers Association (PA) Statistics Yearbook is, as the name suggests, an annually published collection of statistics relating to the publishing industry. It claims to be an 'authoritative analysis and measurement of publishing activity' in the UK.[95] The PA Statistics Yearbook deals only with book and journal publishing, and does not consider its cousins in the newspaper and magazine publishing industry. In 2013, according to the Yearbook, book and journal publishing was a £4.3 billion sector of the UK economy – fully 7% of the creative industry

[90] Wischenbart (n 89) 12.
[91] ibid 15.
[92] ibid.
[93] ibid.
[94] ibid.
[95] Publishers Association, 'PA Statistics Yearbook' (2013), ix.

estimates discussed the following section.[96] It is important to note that the PA Statistics Yearbook is one of the only collections of data in this chapter that considered the year 2013; thus, it must be considered in isolation from other data. The 2013 Yearbook painted a positive picture of the publishing industry, as an industry which 'has a strong future in the mixed-mode economy.'[97] This is without taking into account the influence on the industry of self-publishing authors, Amazon editions, or new digital-only media companies, as these were not considered by the PA survey.[98]

The PA Statistics Yearbook provided a wealth of information about the book publishing industry, breaking it down by sector, by type and by export vs home market, all of which is important when considering the size and nature of the industry. Salient points included the growth of digital over the previous five years (digital performance saw a 305% growth in the five years from 2009-2014).[99]

While the PA Statistics Yearbook is published every year, 2013 was the first year in which journals were considered; the data related mostly to 2011 and 2012. The effect of the introduction of Open Access policies will be seen in the years immediately following. The data included in the survey set a value of £924m on the journals surveyed.[100] However, that data constituted only around 70% of the journal industry in the UK. Thus, by extrapolation, it can be assumed that the journal industry was worth more than £1 billion in 2013. Of the data collected, it can be noted that fully 75% of journal subscriptions were digital-only – from this, we can see that the journal publishing industry adapted excellently to the digital shift.[101]

An interesting point noted in the section that discussed English Language Teaching (ELT) was that the concept of the book was rapidly losing relevance. There was a visible move towards flexible, modular learning, which is blended and online.[102] The market was able to adapt to this, though, as growth figures for digital showed. In 2013, digital sales in fiction grew by 14%,[103] in children's fiction by 28%,[104] in school books by 18%,[105] and in ELT by 45%,[106] all of which showed that digital offerings were available, and were being taken up by the consumer. Worth noting is

[96] ibid ix.
[97] ibid 2.
[98] ibid 90.
[99] ibid 1.
[100] ibid 70.
[101] ibid 69.
[102] ibid 53.
[103] ibid 25.
[104] ibid 41.
[105] ibid 47.
[106] ibid 53.

that the definition of digital in this instance included digital audiobooks, ebooks, subscriptions, downloads and wholly digital material delivered online.[107]

The take-away from the PA Statistics Yearbook 2013 was that the UK publishing industry was maintaining value, with growth in digital and steady physical exports largely offsetting the decline in the home physical market.[108] This is expected to continue into 2015 and beyond.

DCMS Industry Estimates

In January 2014, the Department of Culture, Media and Sport (DCMS) published their Creative Industries Economic Estimates.[109] A comprehensive mapping of what the creative industries and the creative economy are, as well as their contribution to the UK economy, these estimates were the first of what may well become a benchmark of analysing the value of creative content industries to the UK.

These estimates identified the 'Creative Industries' in the UK, according to the government's 2001 Creative Industries Mapping Document[110] as 'those industries which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property.' It is important to note that this particular definition did not refer solely to copyright, but to the wider IPR spectrum, and thus its ambit was wider than the WIPO Guidelines. Salient points from the estimates included that the creative economy accounted for 2.55 million jobs in 2012, which is 1 in every 12 jobs.[111] Furthermore, the GVA of the creative industries was £71.4 billion in 2012, which was 5.2% of the UK economy that year.[112]

The Creative Industries Estimates offered a definition (complete with illustrative diagrams)[113] of what the creative industries are, and how they differ from the creative economy as a whole. Simply put, the creative economy is comprised of those people working in creative industries, and those working in creative jobs in non-creative industries (eg self-employed authors, artists, designers, or

---

[107] ibid 90.
[108] ibid 13.
[109] Department for Culture, Media and Sport, 'Creative Industries Economic Estimates January 2014 Statistical Release' (2014) (DCMS Economic Estimates) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271008/Creative_Industries_Economic_Estimates_-_January_2014.pdf> accessed 8 January 2016.
[110] Department for Culture, Media and Sport, 'Creative Industries Mapping Document' (2001) <https://www.gov.uk/government/publications/creative-industries-mapping-documents-2001> accessed 8 January 2016.
[111] DCMS Economic Estimates (n 109) 10.
[112] ibid 7.
[113] ibid 5.

creative employees working in industries that are not themselves creative). The creative industries are a subset of the creative economy, being those industries where more than a certain proportion of employees are engaged in creative work – ie that they have a high degree of 'creative intensity'. While the industry must have a proportion of creative work in it, the creative industry designation then applies to everyone employed in that industry – ie for publishers, it also would include administrative staff, not just authors, and editors.[114]

The economic estimates of the DCMS were provided in three different ways – GVA, employment, and exports of services.[115] In doing this, not only did they classify creative industries (using UK SIC 2007),[116] but they also classified what they considered 'creative occupations' using SOC (Standard Occupational Classifications) codes,[117] allowing them to create the intersection between creative industries and creative occupations, and gain a greater view of the creative economy as a whole.

As regards industries, DCMS divided them into nine groups:

- Advertising and marketing
- Architecture
- Crafts
- Design: product, graphic and fashion design
- Film, TV, video, radio and photography
- IT, software and computer services
- Publishing
- Museums, galleries and libraries
- Music, performing and visual arts[118]

These groups are thematically very similar to those groups used in the WIPO Guidelines.

The estimates gave a variety of interesting perspectives on the economic contribution of the creative industries, including that the creative industries were responsible for 5.2% of the UK GDP in 2012, which was following the pattern of increasing since 2008.[119] The estimates also pointed out that employment in the Creative Economy accounted for one in every twelve jobs in the UK, and grew at a higher rate than the UK Economy as a whole.[120] The estimates went into further

[114] ibid 4.
[115] ibid 7.
[116] ibid 26.
[117] ibid 25.
[118] ibid 25.
[119] ibid 4.
[119] ibid 7.
[120] ibid.

detail, breaking down the data by industry group, and providing comparisons to previous years, showing year-on-year growth. It is worth noting also that DCMS continued to work with the data in the estimates, producing a detailed report on the employment figures, which was published in June of 2014.[121] It drilled further down into the data, segregating it by group, by location, and other methods of division, and produced many interesting points, including that one in six jobs in London was in the creative economy, with 2.6 million creative economy jobs in the UK in 2013.[122] Similar economic estimates documents were published in January of 2015 and 2016, and they are expected to continue, allowing for more accurate data regarding year on year developments. This continued creation of economic estimates would then lead to a collection of data which could be assessed not only by industry or occupation, but also by year, allowing for further assessment and analysis, and a further understanding of the importance of the creative economy.

[121] Department for Culture, Media and Sport, 'Creative Industries: Focus on Employment' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324530/Creative_Industries_-_Focus_on_Employment.pdf> accessed 11 January 2016.
[122] ibid 17.

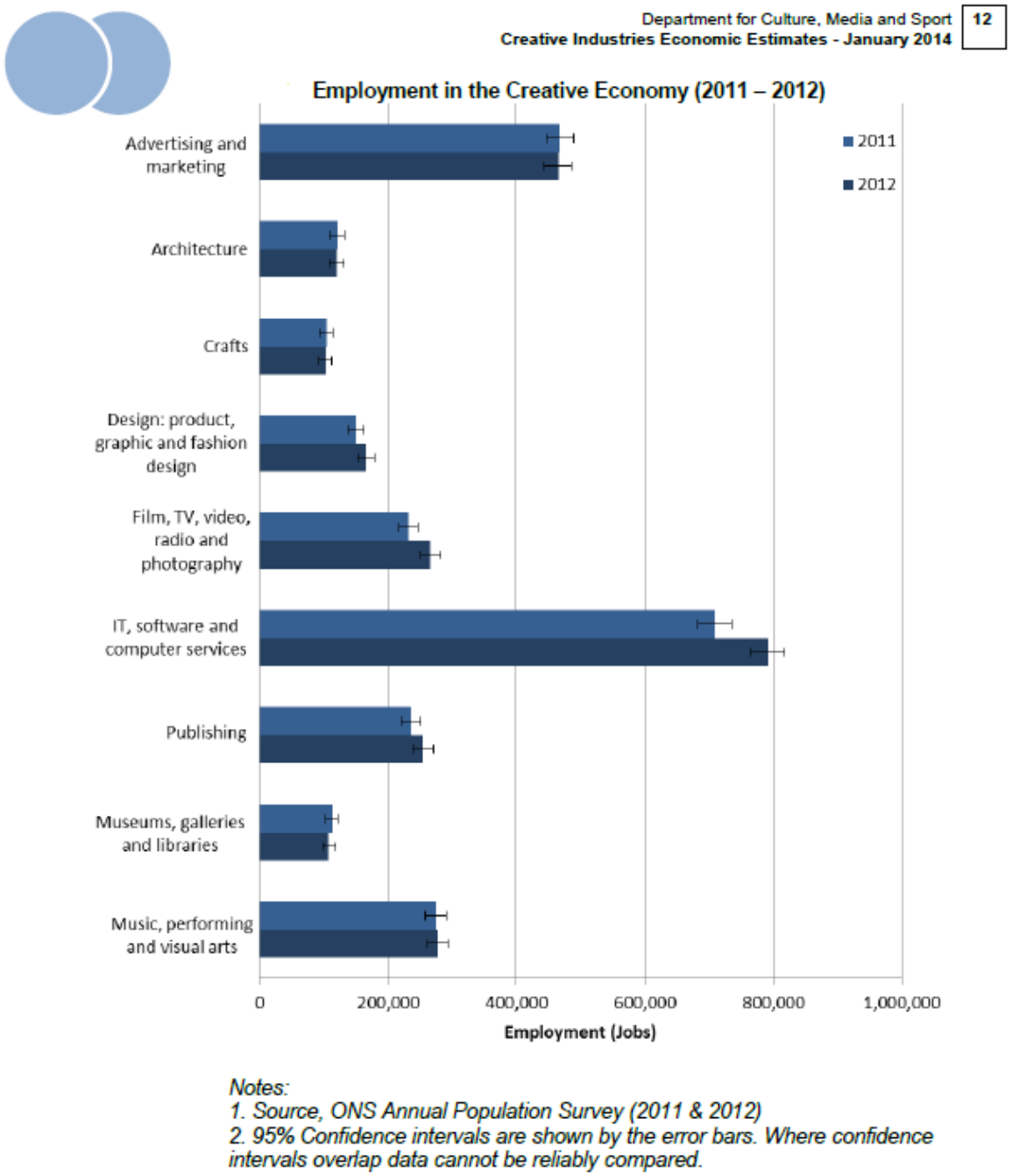
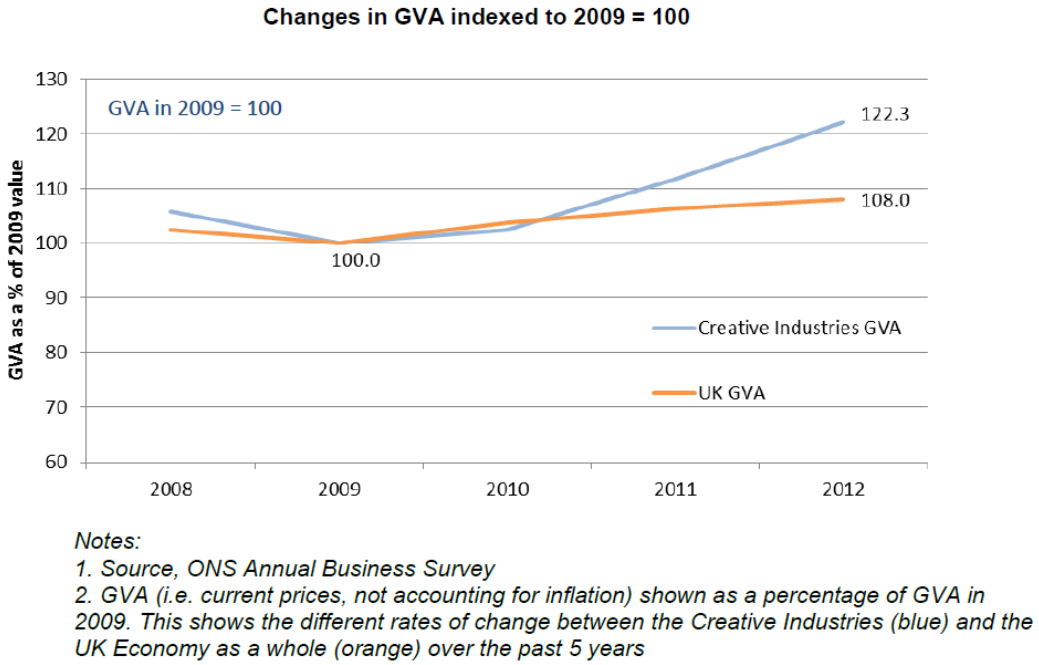


Figure 5: Employment in the Creative Economy

Figure 5: Employment in the Creative Economy shows the breakdown of employment in the creative economy 2011-2012 by group. Publishing as a group was responsible for almost 250,000 jobs in 2011, increasing into 2012. Certainly, these employment figures painted a picture of an industry which was thriving and growing.



Notes:
1. Source, ONS Annual Business Survey
2. GVA (i.e. current prices, not accounting for inflation) shown as a percentage of GVA in 2009. This shows the different rates of change between the Creative Industries (blue) and the UK Economy as a whole (orange) over the past 5 years

Figure 6: Changes in GVA Indexed to 2009

Figure 6: Changes in GVA Indexed to 2009 shows the GVA of the creative industries as compared to the UK as a whole. While both show growth, the creative industries grew at a rate which outstripped the wider UK by a considerable margin. The graph takes the GVA of both in 2009 as the 100-point mark, meaning that comparisons are easily made. An increase of 8% for the UK to 2012 is satisfactory economic growth, but the creative industries more than doubled this, showing growth of 22.3% over the three years from 2009-2012. This growth is encouraging and shows a group of industries which were contributing greatly to the UK economy.

Figure 7: GVA of the Creative Industries shows the GVA of the creative industries broken down into groups over the four years covered by the economic estimates. Every group shows either growth or stability over the course of the four years, with growth visible in advertising and marketing and IT, software and computer services. This is not surprising as the continuing growth of online and digital opened up new advertising revenues and opportunities for digital entrepreneurs. Publishing has shown growth over the four years of £0.4m, which is a 4% growth from 2009 to 2012. This is a robust figure and is reassuring in confirming that the industry is continuing to thrive and adapt to digital.

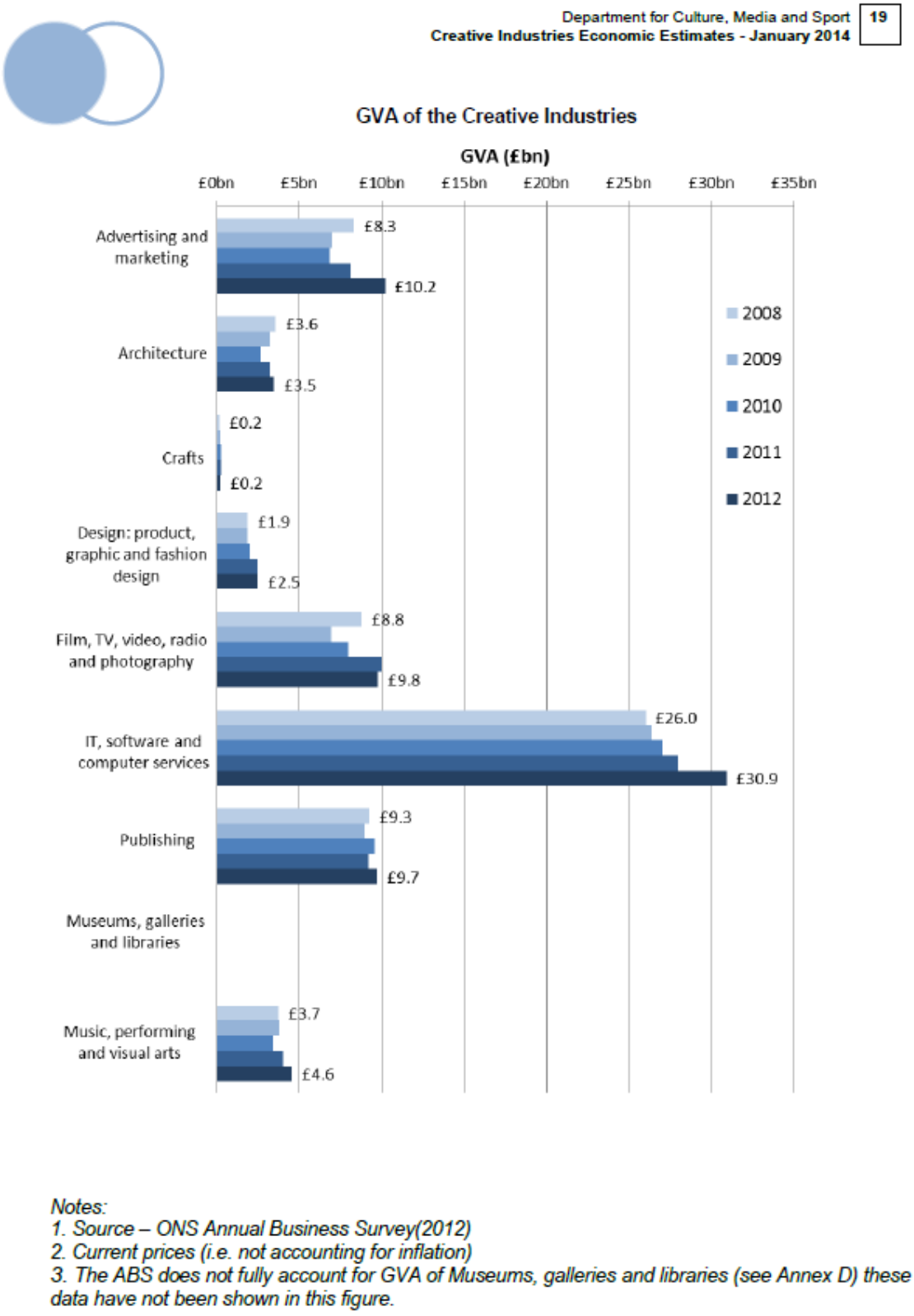


Figure 7: GVA of the Creative Industries

The DCMS industry estimates were split into groups that are thematically very similar to the WIPO guidelines groups. Thus, it is possible to conduct a rough comparison of industry segregation between the WIPO collected results and the DCMS estimates. This comparison

excludes copyright collecting societies, as there are no relevant figures for these in the DCMS estimates.

This chart (Figure 8: Contribution of Core Copyright Industries to GDP by Industry), which is taken from the WIPO comparison document from 2014, shows the breakdown of core copyright contributions by industry.[123]

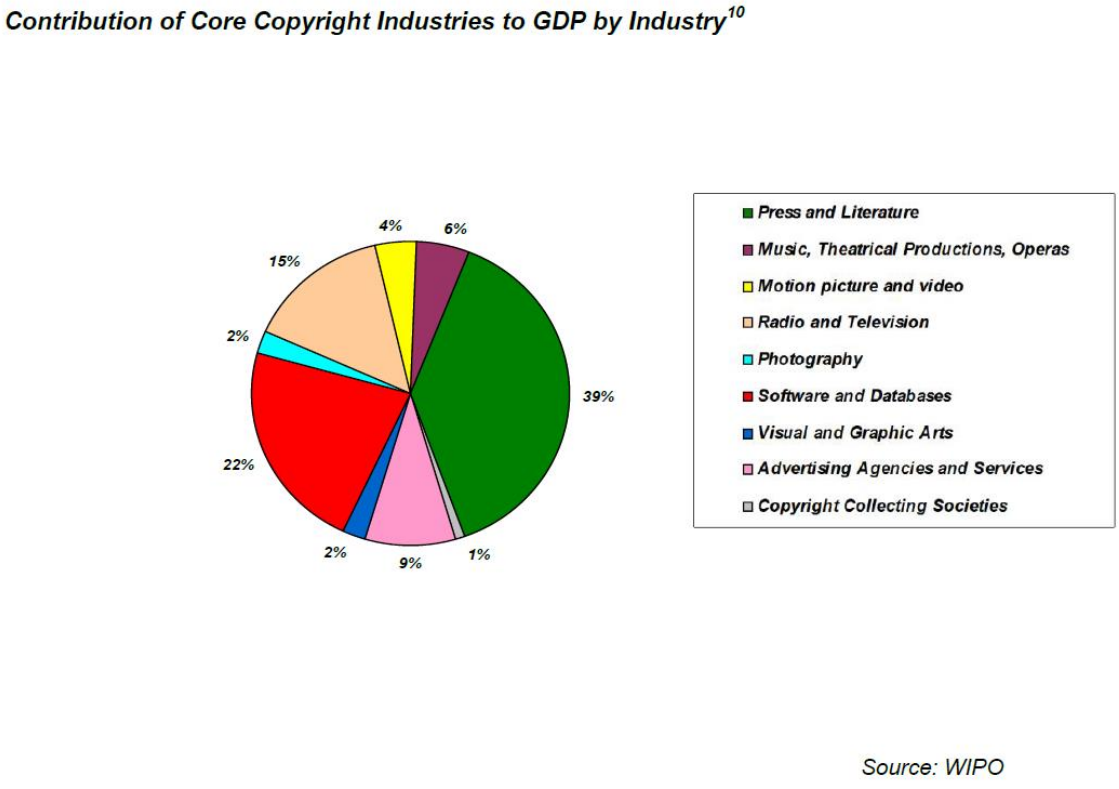


Figure 8: Contribution of Core Copyright Industries to GDP by Industry (WIPO)

[123] WIPO Overview (n 28) 13.

A similar chart, constructed from the DCMS estimates, is visible below (figure 9).

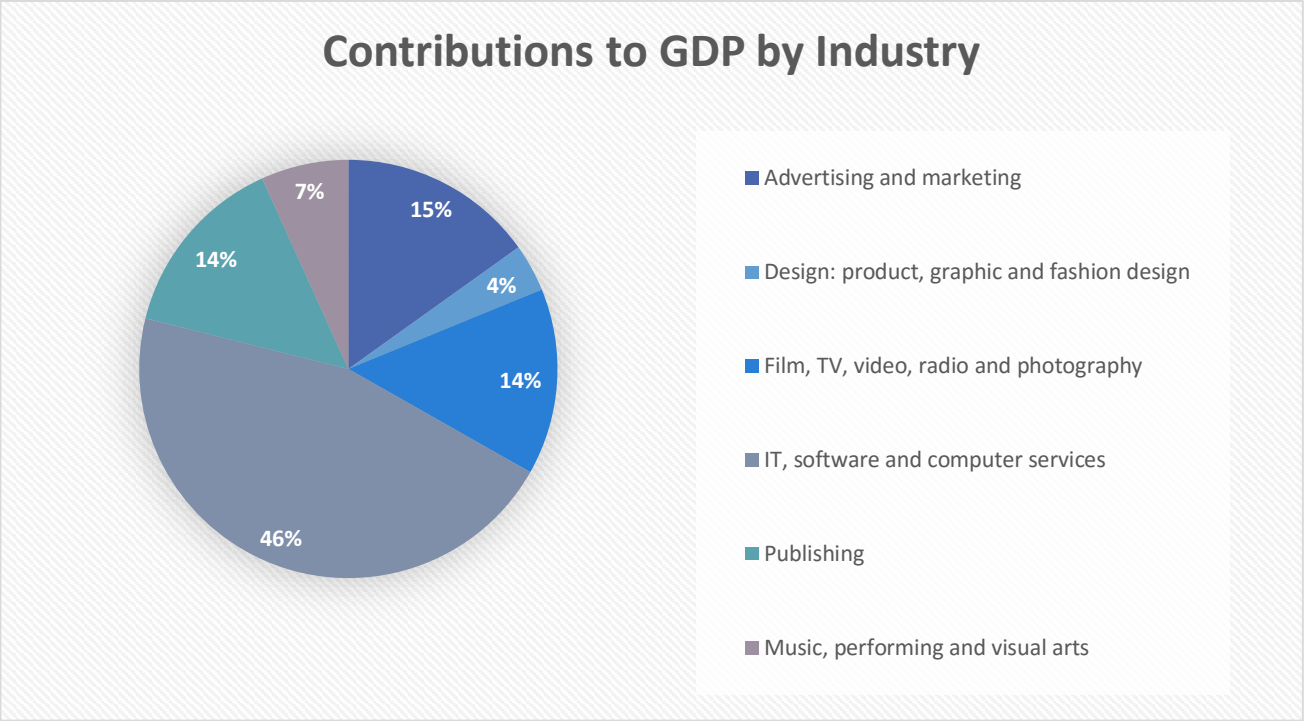


Figure 9: Contributions to GDP by Industry (DCMS)

Although the categories differ slightly, for the most part they are directly comparable, with some combinations of categories (eg film, TV, video, radio and photography is one group in the DCMS estimates, whereas it is three categories in the WIPO classifications). Nonetheless, we can still see that there was a disparity between the largest sectors in the collected WIPO results and in the UK figures – this may be due the fact that the UK is a highly developed country, or due to discrepancies in industry labelling, or any number of other reasons. Nonetheless, we can see that publishing was a strong contributor to the UK GDP in these figures also, standing strong at 14%. This is much lower, however, than the WIPO press and literature figure, which stood at 39%. This may be due to differences in classifications, but equally may be indicative of a shift in focus in the UK. Regardless of the reason for the difference in proportion, it is clear that publishing was still a significant part of the UK economy.

The take-away conclusions from the DCMS estimates were that the creative industries in 2013 were a significant proportion of the UK economy in 2012, and were thriving, even in the aftermath of the recession. The contribution of the creative industries to the UK economy was growing both in real and proportional terms, and thus it would be reckless to make changes to the framework that supports these industries without carefully considering the consequences.

Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union

In 2012, the European Patent Office (EPO) and the Office for the Harmonisation of the Internal Market (OHIM) published a joint report[124] estimating the contribution to economic performance and employment of all intellectual property intensive industries throughout the European Union.[125] The report aimed to provide a 'broad, credible assessment of the combined contribution of industries that make intensive use of the various types of IPRs to the economies of the EU as a whole and of the individual Member States.'[126]

The report covered several types of IPR – patents, trademarks, designs, copyright and geographical indications. The methodology used for the study in the identification of copyright-intensive industries was an adaptation of the 2003 WIPO methodology.[127] That methodology was adapted by the US in its 2012 US Patents and Trademarks Office (USPTO) study, Intellectual Property and the US Economy: Industries in Focus.[128] The US study modified the WIPO-defined core copyright industries by removing the distribution element, in order to bring the copyright industries assessment in line with their patent and trademark industry classifications. As the EPO/OHIM study aimed for comparability with the US study, it followed the same methodology when analysing copyright-intensive industries. However, the study also included in an appendix the results that were obtained using the WIPO methodology, allowing for comparability with both types of publication.[129]

The EPO/OHIM study found that IPR-intensive industries contributed 26% of employment[130] and 39% of GDP in the EU.[131] It also found that copyright-intensive industries held a 3.2% share of total employment and contributed 4.2% to total EU GDP.[132]

---

[124] EPO, OHIM, 'Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union, industry-Level Analysis Report' (2013) <http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf> accessed 11 January 2016.
[125] With the exception of Croatia, which did not have sufficient available data, and was not an EU member at the beginning of the study period.
[126] EPO, OHIM (n 124) 18.
[127] ibid 42.
[128] Economics and Statistics Administration, United States Patent and Trademark Office, 'Intellectual Property and the US Economy: Industries in Focus' (2012) <http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf> accessed 11 January 2016.
[129] EPO, OHIM (n 124) 132.
[130] ibid 59.
[131] ibid 62.
[132] ibid 78.

The study then further broke this down by Member State, noting that the UK came in above the EU average, with 4.7% contribution to total GDP and 4.1% contribution to employment.[133] It provided a table of contribution to GDP and employment of EU27 states using the restricted USPTO methodology, which is reproduced in figure 10: GDP and Employment Shares in Copyright-Intensive Industries by Member State, 2010.

From the chart included directly below here (figure 10), the UK stood sixth in terms of contribution to GDP, and fifth in terms of contribution to employment, both very strong positions. The UK sits firmly amongst those countries relying on creative and copyright industries to provide employment and support the economy.

As mentioned, the reason for using a stricter copyright industry definition was to allow comparability with the US Patent and Trademark Office report of 2012. This report gave a figure of 4.4% GVA and 3.5% employment for copyright-intensive industries in the US.[134] The EU as a whole was 0.2% behind the US in this regard, but the UK copyright industries contributed more proportionately in terms of both GVA and employment than the US.

[133] ibid 79.
[134] USPTO (n 128) 45.

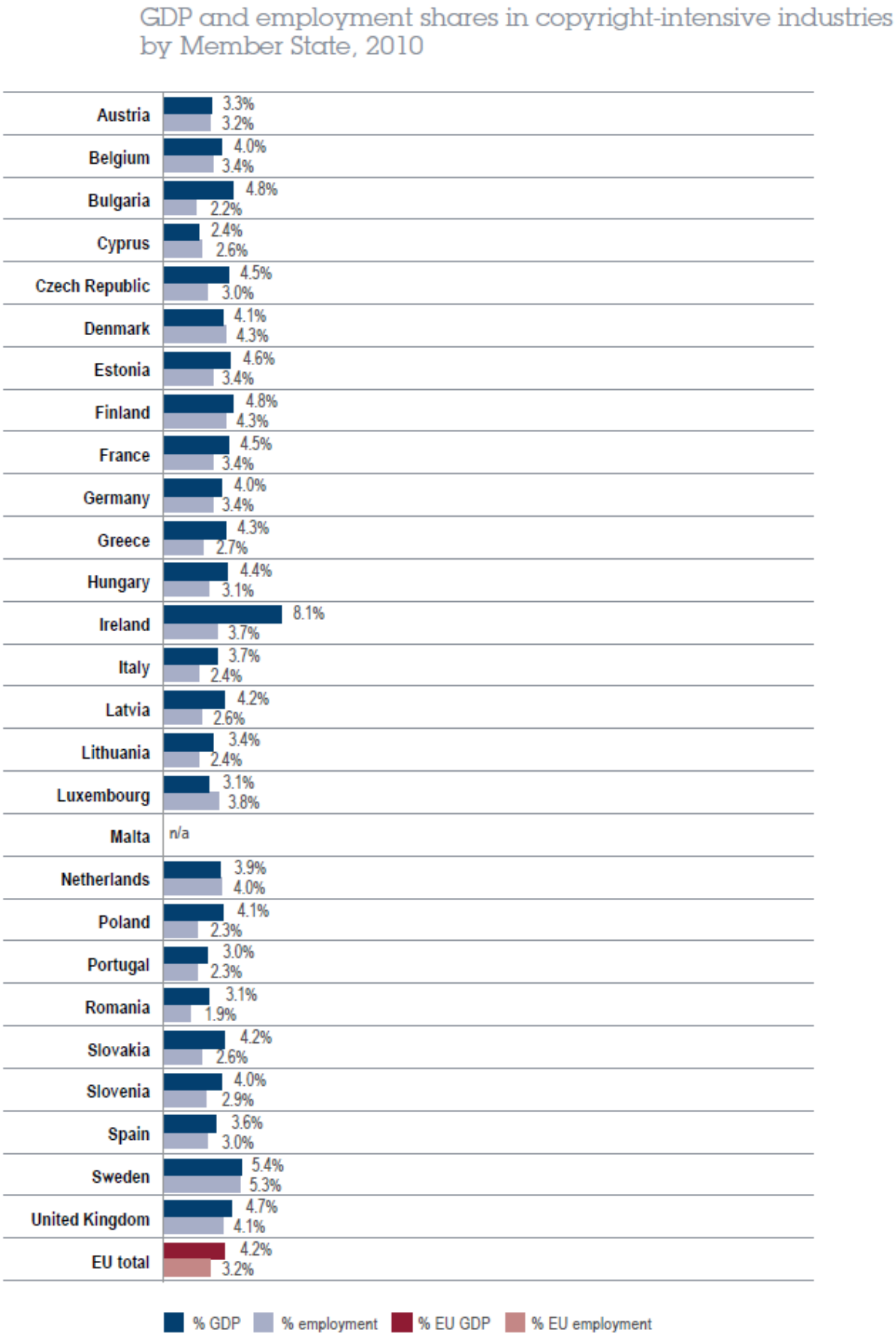


Figure 10: GDP and Employment Shares in Copyright-Intensive Industries by Member State, 2010

The appendix results, which used the unmodified WIPO classifications to produce an estimate of EU copyright industry contributions, are partially reproduced in figures 11: Economic Contribution of Core Copyright-Intensive Industries and 12: Contribution to the EU Economy of Core and Non-Core Copyright-Intensive Industries. These figures are not produced on a country-by-country basis, but only for the EU as a whole. There are two sets of data provided, one for the core copyright industries, and one including all four types of copyright industry, as detailed in the WIPO guidelines and discussed above.

This table (fig 11: Economic Contribution of Core Copyright-Intensive Industries), which is taken from the appendices of the report, showed a comparison between the USPTO data, as discussed above, and a full WIPO set of data. The discussion in the appendix covered those industries which were included in the USPTO copyright industries, the WIPO industries, and both together – as can be seen in the figure, 31 industries were present in both analyses, two were USPTO-only and 18 were WIPO-only.[135] This difference in analysis meant that the numbers given in the report proper are stricter, and thus smaller, than a WIPO analysis, but the inclusion of WIPO-compliant data in the appendix allows for a little more discussion.

Economic contribution of core copyright-intensive industries

Methodology	Number of industries	Employment	GDP (€ million)
Core USPTO (and WIPO)	31	6,946,471	501,194
Core_USPTO (not WIPO)	2	102,933	8,665
Core WIPO (not USPTO)	18	3,022,395	229,375
Total WIPO	**49**	**9,968,866**	**730,559**
Total USPTO	**33**	**7,049,405**	**509,859**

Figure 11: Economic Contribution of Core Copyright-Intensive Industries

[135] EPO, OHIM (n 124) 132-140.

Contribution to the EU economy of core and non-core copyright-intensive industries

	Employment	Share in total EU employment	GDP (€ million)	Share in total EU GDP
Core	9.968.866	4,6%	730.569	5,9%
Inter-dependent	936.753	0,4%	62.087	0,5%
Partial	1.831.913	0,8%	78.833	0,6%
Non dedicated	1.922.931	0,9%	86.367	0,7%
Total Non Core	4.691.596	2,1%	227.287	1,9%
Grand Total	14.660.462	6,7%	957.856	7,8%
EU total	218.400.733		12.278.744	

Figure 12: Contribution to the EU Economy of Core and Non-Core Copyright-Intensive Industries

The second table (fig 12: Contribution to the EU Economy of Core and Non-Core Copyright-Intensive Industries) taken directly from the appendix of the EPO/OHIM report provided figures for the EU as a whole in each of the four copyright industries classifications. From this table, we can see that the overall EU contributions to employment came in at 7.8% of EU GDP. This figure, more than a twelfth of EU employment, showed the contribution of the creative and copyright industries to EU employment, and reinforced their position as an important industry in the EU. The next, and final, piece of research which will be discussed in this chapter also considered the creative industries and their role in the EU.

Creating growth: Measuring cultural and creative markets in the EU

The final piece of research that will be discussed in this chapter is the 2014 Ernst and Young study 'Creating Growth: Measuring cultural and creative markets in the EU'.[136] This study, which was commissioned by GESAC, the European Grouping of Societies of Authors and Composers, aimed at analysing the cultural and creative markets in the European Union.

The report analysed the creative and content industries as whole, pointing out that they were the third-largest employment sector in the EU, behind only construction, and food and beverage service activities (ie restaurants and bars) in 2012.[137] The study also looked at smaller segments of the creative and content industries, with the most relevant of these to the research topic at hand being newspapers and magazines, and books.

---

[136] Ernst and Young, 'Creating Growth: Measuring cultural and creative markets in the EU' (2014) <http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/$FILE/Creating-Growth.pdf> accessed 30 November 2015.
[137] ibid 10.

The report included an 'at-at-glace' section for each of its 11 cultural sectors. Salient facts for the book industry included that the book industry employed 646,125 people in the EU in 2012,[138] and that in 2013, reading a book was the second most common recreational activity declared by citizens in the EU, falling behind only watching TV or listening to the radio, which were classed together.[139]

The study also looked to the future, pointing out that books were slow to adapt to digital, but growth for ebooks worldwide was forecast to be 30% per year for 2010-2015.[140]

The same at-a-glance section for newspaper and magazine publishing, which included journal publishing also, gave the figure for employment in 2012 as 483,679,[141] which was more than 1.2 million people across both sectors. Total revenue for the newspaper and magazine industry was more than €70b euro, making it the fourth largest of the creative sectors.[142] Similar to the Statistical, Ecosystems and Competitiveness Analysis of the Content industries,[143] it painted a picture of an industry which was grossly affected by the digital shift, but which was adapting to new content models and advertising revenues.[144]

The study in general paints Europe as the home of world-class content creators and a market with the potential for great growth. It counsels of the need for strategies to ensure that Europe remains a global leader in the creative economy.[145]

Conclusion

Given the variety of research and viewpoints put forward and discussed in this chapter, a SWOT analysis will give a clear overview of the situation facing the UK copyright industries. SWOT analysis allows for a discussion of the strengths, weaknesses, opportunities, and threats relating to a particular business or industry. In this case, it allows for a clear overview of the copyright industries and their potential for future growth.

Strengths

- The UK's copyright industries' contribution to GDP and employment is the fifth-largest in Europe
- The UK's core copyright industries' contribution to GDP and employment is the sixth-largest in Europe

[138] ibid 30.
[139] ibid 31.
[140] ibid 32.
[141] ibid 36.
[142] ibid 10.
[143] Leurdijk and others (n 57).
[144] ibid 38.
[145] ibid 18.

- English as a native language provides advantages as a lingua franca, making export easier
- The UK's book and journal publishing industries were worth £4.3 billion in 2013[146]
- The creative industries were worth £71.4 billion in 2012,[147] increasing to £76.9 billion in 2013[148]
- Newspaper and publishing industries consistently make up 12-13% of creative industries, remaining relatively stable despite upheaval of business models[149]
- On a more global scale, when compared to other WIPO reports, the UK stands in the upper echelons in terms of both employment and GVA

Weaknesses

- The UK is geographically isolated from the rest of Europe, leading to greater import and export costs
- The UK is relatively small, both in terms of geographic size and population size
- The UK's legacy newspaper publishers have been slow to adapt to new, digital publishing methods, meaning they have not been as profitable as they could have been[150]
- Similarly, large publishers can take longer to respond to digital innovations, as they have to simultaneously support their legacy business models[151]
- Certain aspects of copyright law can be seen as blocks to new entrants in the creative industries, lessening potential for growth in the UK[152]

Opportunities

- The UK can capitalise on its strengths in providing creative content to continue to be a global content provider
- Protection of copyright industries and legacy businesses in this time of change will allow legacy publishers to adapt and thrive
- Allowing the entry of new, smaller, digital-only companies will make the most of the digital shift
- Movements towards self-publishing and smaller, niche publishing houses allows greater flexibility for authors and content creators
- A balance between protecting established businesses and encouraging growth will allow the UK's copyright industries to embrace the digital shift and continue to grow and contribute greatly to the UK economy

---

[146] PA Statistics Yearbook (n 95).
[147] DCMS Economic Estimates (n 109) 7.
[148] Department for Culture, Media and Sport, 'Creative Industries Economic Estimates' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394668/Creative_Industries_Economic_Estimates_-_January_2015.pdf> accessed 11 January 2016.
[149] See fig 2.
[150] Simon and De Prata (n 62).
[151] Leurdijk, Slot, and Nieuwenhuis (n 71).
[152] Hargreaves (n 42).

Threats

- The adaptation to digital may be too difficult for certain businesses and segments of the industry – bookshops in particular struggled globally to adapt, with many large chains closing their doors, including Chapitre in France and Borders in the United States
- Smaller new digital-only companies could be more nimble and quicker to adapt than legacy companies, leading to the demise of more established companies
- Over-regulation could lead to the strangling of content industries
- Lack of protection for legacy publishers could lead to a decline in quality of creative content
- Failure to find a balance between encouraging growth and protecting established content could lead to a decline in the quality, quantity, and profitability of UK creative content and copyright industries

The conclusions that can be taken from the assorted research presented in this chapter are clear – the creative industries, and especially the publishing industries, were in flux, and adapting to the shift to digital. They consistently made a substantial contribution to the UK economy, and thus should be supported at all levels, from creators to distributors. The implementation of changes or exceptions to copyright law should be carefully considered and supported by strong, reproducible, verifiable research indicating its likely outcomes before implementation. This research needs to be strong enough to comply with the IPO's standards of evidence for policy-making.[153] Even with supporting research, changes to copyright law must be implemented with caution – as the private copying exception showed,[154] supporting evidence may not be enough to prevent the quashing of a new exception to copyright law.

In 2010-2015, the publishing industries remained profitable, and were producing steady results over a period of years, indicating their stability even in the uncertainty of the digital shift. Thus, the implementation of changes to copyright law without giving the market a chance to adapt to the changes it is experiencing would be premature. The impact of implementing an exception relatively quickly will be investigated in the next chapter, a case study of two of the exceptions recommended in the Hargreaves Review,[155] which were brought into UK law in 2014.

---

[153] IPO, 'Guide to Evidence for Policy' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388238/consult-2011-copyright-evidence.pdf> accessed 14 January 2016.
[154] For more, see the next chapter.
[155] Hargreaves (n 42).

Chapter 6: The Hargreaves Exceptions – A Case Study

Introduction

As the literature review demonstrated, there were repeated calls for exceptions to copyright in order to improve adaptation to the digital shift. Recommended exceptions varied from better access for disabled people to education and teaching exceptions, and in the UK were possible based on provisions of the InfoSoc Directive.[1] The implementation of those exceptions in the UK was based on research that has been criticised for its unreliability.[2] This chapter will use two of the 2014 copyright exceptions, the private copying exception and the text and data mining (TDM) exception, as a case study for the implementation of copyright exceptions and the effects that followed from that implementation. The implementation of the private copying exception can be used as an example of the dangers of improper preliminary research. On the other hand, as the TDM exception was introduced very shortly after the technique became a valid research tool, it is an ideal case study for assessing how digital development can be dealt with in terms of copyright legislation. The assessment of a newly-implemented exception dealing with a recently-developed tool allows for a snapshot view of how digital development is dealt with, from the perspective of the individual author or researcher, the rights holders for databases and other large-scale text repositories, and the legislative arm of government.

This chapter will consider first the rationale for implementing an exception to copyright law, and then the specific way in which this applies to two exceptions in the UK. It discusses the implementation of the private copying exception and its subsequent judicial review, before then moving on to discuss the implementation of the TDM exception, as well as the effect that the exception has had in the UK. Finally, discussion will be expanded to similar calls for TDM exceptions across the European Union, including considering the available research associated with these proposals, before concluding.

Rationale for Exceptions

An exception to copyright law is a form of government intervention. Government intervention is justified where there is a 'clear need which it is in the national interest for the government to address.'[3] Examples of such government intervention in the copyright spectrum can be seen in the

---

[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10, Art 5 (InfoSoc Directive).
[2] See section 'Oxford Economics Report' in Chapter 5.
[3] Her Majesty's Treasury, 'The Green Book: Appraisal and Evaluation in Central Government' (2011) 11.

historical exceptions of fair dealing, which allowed for a copyright exception in the cases of research, study (non-commercial only), quotation, criticism, and review. Licensing on such a huge scale would have been unfeasible, and an exception allowed such activities to occur in a scenario where overly restrictive copyright laws would have prevented the free functioning of the market.

The definition of a clear need for intervention used for the purposes of this chapter will be taken from the UK Treasury Green Book (2003 update). The Green Book is a guide to best practice in project and programme appraisal for executive agencies and government central departments. It gives guidance on economic, financial, social and environmental assessments and draws on fundamental economic theory.[4] The Green Book sets out two reasons for government intervention: market failure, and the need for clear government distributional objectives to be met. While market failure is not the only justification for an exception to copyright law – the Green Book itself gives a second reason, and overarching European legislation would also provide for exceptions, provided they met the Berne Three-Step Test,[5] the scenario for these particular exceptions was market failure. Market failure is a scenario where the market 'has not and cannot of itself be expected to deliver an efficient outcome',[6] and thus intervention will aim to redress this failure.

An 'efficient outcome', in terms of economics, is an outcome where maximum economic efficiency is obtained. Economic efficiency, then, is defined as achieved when 'nobody can be made better off without someone else being made worse off. Such efficiency enhances prosperity by ensuring that resources are allocated and used in the most productive manner possible.'[7] Obviously, real life is not as simple as a theoretical example, and markets frequently cannot achieve such an outcome. In this scenario, they are said to fail. This can then negatively affect the market, through inefficient returns to society as a whole or to individuals or businesses involved. Such inefficiency can in turn affect motivations and behaviours in a way which will further negatively affect the market, leading to worse outcomes for society and for individuals. There may be many reasons for this failure.

The Green Book highlights the potential reasons for market failure:

---

[4] JISC, 'The Value and Benefit of Text Mining to UK Further and Higher Education Digital Infrastructure' (2012) <http://bit.ly/jisc-textm> accessed 12 January 2016, 39.
[5] The Berne Three-Step Test is discussed in more detail in Chapter 2.
[6] Green Book (n 3) 11.
[7] ibid 51.

> » Due to the 'public good' characteristics of the goods or service under consideration
>
> » Where there may be significant 'externalities' (positive or negative) involved
>
> » Where there is imperfect information or information asymmetry between buyers and sellers
>
> » As a result of market power or structure (eg a lack of competition, monopoly power or high entry costs deterring entrants)[8]

Thus, the implementation of a copyright exception should only be considered where the market fails to reach economic efficiency on its own – where there is no viable alternative to the government intervention, as the failure to intervene would lead to a total market failure. A total market failure is, of course, less desirable than government intervention, as intervention guarantees the availability of a good, service, or process, whereas total market failure would deny the possibility of its being made available entirely.

Private Copying

The market failure in the case of private copying is obvious. Private copying refers to the reproduction of legally held copyright material for the purposes of an individual's private use for reasons which are neither directly nor indirectly commercial.[9] This may include scenarios such as backup, remote storage, format-shifting, etc. For many consumers, the first step after purchasing a new CD is to rip it to their iTunes library or equivalent – the possibility of licensing this is remote at best. Thus, the need for an exception was clear – the market could not possibly license each private reproduction of legally held CDs onto iPods, phone, MP3 players or cloud storage systems.

The private copying exception,[10] which came into force on October 1, 2014,[11] was one of the recommendations made by the Hargreaves Review. It, together with the other Hargreaves exceptions, suffered a long journey to implementation, from the exception envisaged in the 2001 InfoSoc Directive,[12] which the UK declined at the time to implement, through the Hargreaves

[8] JISC (n 4).
[9] The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361 Reg 3(1).
[10] ibid.
[11] ibid.
[12] InfoSoc Directive (n 1) Art 5.

Review,[13] which recommended its revival. From this recommendation, it would be a further three years before the exception was tabled in the House of Commons. Even then it vanished without explanation mere days before it was due to be voted upon.[14] It reappeared several months later, with an implementation date six months after what was originally envisaged. The Hargreaves Review recommended several exceptions, which were contained in five Statutory Instruments.[15] Those exceptions were caricature, parody or pastiche, quotation, research and private study, text and data mining, education and teaching, archiving and preservation, public administration, private copying, and accessible formats for disabled people. Each exception was narrowly drawn, applicable only in certain circumstances, and to certain persons or bodies.[16]

The private copying exception created a right for consumers to copy and format-shift their own private music, films, ebooks, and other digital media and store them remotely, as long as it was for personal use, and only so long as the original or master copy was legitimately obtained. This meant that it could not be shared between family members or friends, nor was the exception a guard against torrented or otherwise illegitimately obtained creative content.[17] The exception was implemented based on the powers granted by the InfoSoc Directive, which allowed for an optional private copying exception with fair compensation for rights holders.[18] The UK government, in implementing a private copying exception, decided that no compensation was fair compensation, and enacted the exception without any kind of private copying levy, such as those seen in many

[13] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011) (Hargreaves Review).
[14] IPO, 'Progress of the exceptions to copyright regulation' (*Gov.uk,* 8 May 2014) <https://www.gov.uk/government/news/progress-of-the-exceptions-to-copyright-regulations> accessed 12 January 2016.
[15] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372; The Copyright and Rights in Performances (Disability) Regulations 2014, SI 2014/1384; The Copyright (Public Administration) Regulations 2014, SI 2014/1385; The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361.
[16] IPO, 'Exceptions to Copyright: An Overview' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448269/Exceptions_to_copyright_-_An_Overview.pdf> accessed 23 November 2015.
[17] Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 Reg 3.
[18] InfoSoc Directive (n 1) Art 5(2)(b).

parts of Europe.[19] This decision not to implement a levy system was backed up by an Impact Assessment from the IPO.[20]

The lack of any levy system was the reason for the exception's being challenged shortly after implementation by the British Academy of Songwriters Composers and Authors (BASCA), the Musicians' Union,[21] and industry representatives UK Music, who sought judicial review of the exception. In a judgment issued in June 2015, Green J concluded that the harm done to rights holders through the absence of a levy or compensation scheme was more than minimal.[22] This was followed in July 2015 by a judgment quashing the exception entirely, albeit with prospective (*ex tunc*) effect. Mr Justice Green declined to comment on whether the quashing would have retrospective (*ex nunc*) effect. He further declined to a make reference to the CJEU.[23] The quashing of the private copying exception was perhaps not unexpected, given that the UK's regime made no provision for remuneration. It is, however, cause for the IPO to reconsider its pre-implementation research. Although the private copying exception was the subject of a preliminary report[24] and an impact assessment,[25] the quashing of the regulation, together with the suggestions that the harm it would cause to rights holders would be more than de minimis made elsewhere, [26] should be taken as a cautionary tale to the IPO, and cast some doubt on the reliability of the research it relied upon. Thus, the IPO must be sure to carefully consider the implications of changes to copyright law before enacting them and rely on research which is verifiable and reproducible – following their own evidence policy.[27]

---

[19] WIPO, 'International Survey on Private Copying Law & Practice' (2013) <http://www.wipo.int/edocs/pubdocs/en/copyright/1037/wipo_pub_1037_2013.pdf> accessed 23 November 2015.
[20] Department for Business, Innovation, and Skills, 'Impact Assessment: Copyright Exception for Private Copying' (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336306/2012-10-04-RPC11-BIS-1055_3__-Copyright_exception_for_Private_Copying.pdf> accessed 18 December 2015.
[21] BASCA <http://basca.org.uk/> accessed 18 December 2015.
[22] *BASCA v Secretary of State (Department for Business, Innovation and Skills)* [2015] EWHC 1723 (Admin).
[23] *BASCA v Secretary of State (Department for Business, Innovation and Skills)* [2015] EWHC 2041 (Admin).
[24] Roberto Camerani and others, 'Private Copying' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309681/ipresearch-private-150313.pdf> accessed 12 January 2016.
[25] Department for BIS (n 19).
[26] Karina Grisse and Stefan Koroch, 'The British private copying exception' (2015) 10(7) JIPLP 562.
[27] IPO, 'Guide to Evidence for Policy' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388238/consult-2011-copyright-evidence.pdf> accessed 18 December 2015.

Definition of TDM

Text and data mining (TDM), which is also variously referred to as text mining, data mining, text data mining, or text analytics, is a process that analyses large amounts of texts using a computer, so as to obtain insights which would not be possible with a single human researcher. The power and popularity of mining developed in tandem with that of computers and processing power – in a 1999 paper the industry was described as 'nascent'.[28] The author pointed out that, at the time, TDM had 'almost no practitioners'.[29] In early 2015, opinions on TDM were that it 'might transform the way scientists read [...] literature'[30] and 'the potential that comes with mining scientific literature is enormous'.[31]

A strict definition of TDM is hard to pin down, because it is composed of a range of techniques, all of which are constantly evolving, changing, and developing. The underlying idea, however, is that it is the computer-based analysis of large amounts of data. The processing power of computers allows large amounts of text and data to be analysed and new inferences drawn from relationships which would not be apparent to individual human readers. It is available to almost anyone with the requisite level of skill, allowing them to assemble data in text, picture, sound, or other form, and analyse that data for new insights and knowledge. Various definitions of TDM are offered by each new publication; for the purposes of this chapter, we will stay in line with the proposal put forward by the Publishing Research Consortium (PRC) in their 2013 report on text mining:

> Data mining is an analytical process that looks for trends and patterns in data sets that reveal new insights. These new insights are implicit, previously unknown and potentially useful pieces of information. The data, whether it is made up of words or numbers or both, is stored in relational databases. It may be helpful to think of this process as database mining or as some refer to it 'knowledge discovery in databases'. Data mining is well established in fields such as astronomy and genetics.[32]

Thus, TDM is a range of techniques used in a multitude of ways, encompassing a host of subject areas and data types, all of which are aimed at increasing knowledge. The rise of TDM is

---

[28] Marti A Hearst, 'Untangling Data Mining' (The 37th Annual Meeting of the Association for Computational Linguistics, University of Maryland, June 1999) 3.
[29] ibid.
[30] Editorial, 'Gold in the Text?' (2012) 483 Nature 124.
[31] Sergey Filippov, 'Mapping Text and Data Mining in Academic and Research Communities in Europe' (2014) 16/2014 Lisbon Council Special Briefing, 3.
[32] Jonathan Clark, 'Text Mining and Scholarly Publishing' (2012) Publishing Research Consortium, 6.

compounded by the rise of Big Data[33] – experts suggest that we have created more data in the years since 2010 than in the entirety of human history preceding that.[34] Consumers, researchers, sales people and even computers communicating with each other all create data about their actions, and that data is ripe for analysis. The development of smart systems which can extract new links and liaisons from that excess of data is a move which could lead to new discoveries – it has already been used to find new uses for existing drugs, by mining the existing corpus of research for side effects and then using this for knowledge discovery.[35] TDM, however, falls foul of copyright legislation in that mining engines create a copy of the text in order to mine the content– this was permitted under fair dealing exceptions for a single person with a photocopier,[36] but the large-scale copying of potentially thousands of articles by a machine would not be covered by the exceptions enshrined in legislation.

The potential for TDM is almost limitless – as mentioned in the definition offered above, it is well established in astronomy and genetics, but the analysis of data can have applications in fields as distinct as digital humanities and medical research. As a research tool, TDM is nothing more than a blunt instrument, mechanically analysing only what it is told to do, but its strength lies in the fact that it can drastically cut down the amount of time required to analyse a large amount of data. A corpus of research papers examined by hand searching for a single word, for example, could take weeks; furthermore, human researchers are fallible, and could miss important instances of whatever it is they seek. A computerised system, on the other hand, is not only faster, but also more reliable. TDM is only as clever as the researcher who uses it, but it is a range of techniques which can be used in circumstances from analysing how gender affects assessment of teaching skill[37] to analysing patient records to find new medical insights.[38]

---

[33] Seref Sagiroglu and Duygu Sinanc, 'Big Data: A Review' (Collaboration Technologies and Systems (CTS), 2013 International Conference, May 2013).
[34] See, for example, Eric Schmidt, CEO of Google, making a similar statement in 2010: MG Sigler, 'Eric Schmidt: Every 2 Days We Create as Much Information as We Did Up To 2003' (*Techrunch.com*, 4 August 2010) <http://techcrunch.com/2010/08/04/schmidt-data/> accessed 26 November 2015; Åse Dragland, 'Big Data, for better or worse' (*SINTEF,* 22 May 2013) <http://www.sintef.no/en/news/big-data--for-better-or-worse/> accessed 26 November 2015.
[35] LIBER, 'Text and Data Mining: The Need for a Change in Europe' (2014) <http://libereurope.eu/wp-content/uploads/2014/11/Liber-TDM-Factsheet-v2.pdf> accessed 21 March 2015, 1.
[36] Copyright Designs and Patents Act 1988 s 29(1) (CDPA).
[37] Benjamin H Schmidt, 'Gendered Language in Teacher Reviews' (*benschmidt.org,* 2015) <http://benschmidt.org/profGender> accessed 17 November 2015.
[38] Jon Hamilton, 'Can a Cancer Drug Reverse Parkinson's Disease and Dementia?' (*NPR.org*, 20 October 2015) <http://www.npr.org/sections/health-shots/2015/10/17/448323916/can-a-cancer-drug-reverse-parkinsons-disease-and-dementia> accessed 26 November 2015; Claire Zillman, 'Parkinson's Patients Show

Call for Exception in UK

Digital Opportunity, the Hargreaves Review of 2011,[39] as in so many other examples in this thesis, was one of the sources of the call for a TDM exception in the UK. At its publication in 2011, the Review suggested that

> The UK should [...] promote at EU level an exception to support text and data analytics. The UK should give a lead at EU level to develop a further copyright exception designed to build into the EU framework adaptability to new technologies. This would be designed to allow uses enabled by technology of works in ways which do not directly trade on the underlying creative and expressive purpose of the work.[40]

Although it took several years for this recommendation to be put into action, the TDM exception[41] was one of the exceptions that made their way through the British Parliament to reach implementation in 2014, coming into effect on the 1st June.[42] The Hargreaves Review called for a TDM exception, but it did not cite any supporting evidence in this call. However, we can see from searching the publicly available submissions to the Review that ten of those mentioned TDM or data analytics.[43] Of those ten, nine called for an exception to be included in current copyright

---

Improvement After Taking Cancer Drug' (*Fortune,* 19 October 2015) <http://fortune.com/2015/10/19/cancer-drug-parkinsons/> accessed 26 November 2015.

[39] As mentioned in the Literature Review, the Hargreaves Review was commissioned in 2010 by David Cameron in response to remarks by Google's founders that the UK's copyright regime would not have allowed them to set up their business in the UK. Professor Hargreaves, a journalist by trade, was asked to head the six-month review of the UK intellectual property regime, a mammoth task which he undertook admirably. The review built upon the Gowers Review, which was completed four years earlier by Andrew Gowers, and expanded upon some of Gowers' suggestions, while also adding in recommendations which were unique to Hargreaves, due to the developments in IP, even in that short time. 'The founders of Google have said they could never have started their company in Britain. The service they provide depends on taking a snapshot of all the content on the internet at any one time and they feel our copyright system is not as friendly to this sort of innovation as it is in the United States. Over there, they have what are called "fair use" provisions, which some people believe gives companies more breathing space to create new products and services.' Hargreaves (n 12) 44.

[40] Hargreaves (n 12) 51.

[41] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372.

[42] ibid s 1.

[43] IPO, 'Review of Intellectual Property and Growth: Submissions Received' (2010) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview/ipreview-c4e.htm> accessed 17 March 2015. The submissions which mentioned TDM or data analytics were: AstraZeneca, British Library, British Library Driving UK Research (a collection of research perspectives, not intended to represent the opinion of the British Library), Copyright for Innovation (a collection of

legislation, with Scibella's submission mentioning text mining, but not calling for an exception. For perspective, 256 submissions to the Review are available to view[44] – those nine calling for a TDM exception amounted to 3.52% of submissions.

An extensive literature search conducted for the purposes of this doctoral project revealed a startling lack of discussion of the need for a TDM exception. Although in 2014 there were reports commissioned and published by the DGs of the European Commission, as discussed later in this chapter, and the UN published a report in 2012 on Big Data,[45] there was very little available which actually called for a TDM exception. Numerous publications were and are available on the topic of big data and data mining,[46] and data was of concern in many digital reviews,[47] but these publications did not call for an exception to the law. The submissions to the Hargreaves review stood somewhat alone in this respect.

In order to justify such an exception, there must have been a sufficient market failure that obtaining TDM licences from publishers was unfeasible for potential miners. In order to investigate whether there was support for this position, we will look to several publications from the years preceding the implementation of the 2014 Statutory Instrument, and consider their conclusions on the topic of the feasibility of TDM.

In 2011, the PRC commissioned a study from Dutch consulting company BV Bronfonteyn. This study consisted of 29 interviews and 190 surveys on the topic of journal article mining.[48] It found that, at the time, the majority of publishers were receiving requests to mine, but in very low

---

interested parties), Copyright for Knowledge, IBM, LACA (the Libraries and Archives Copyright Alliance), the National Centre for Text Mining, Scibella, and the Joint Information Systems Committee (JISC). It is worth noting that many of the parties involved in these submissions co-signed more than one – for example LACA's chair signed LACA's own submission, and the Copyright for Innovation submission; the Chair of Copyright for Knowledge was also a signatory to the Copyright for Innovation submission; the British Library submitted its own piece, a collection of supporting essays, and co-signed the Copyright for Innovation submission, and JISC funded the National Centre for Text Mining.

[44] IPO, Submissions Received (n 42).

[45] United Nations Global Pulse, 'Big Data for Development: Challenges & Opportunities' (2012).

[46] Sophia Ananiadou and others, 'Supporting the Education Evidence Portal via Text Mining' (2010) Philosophical Transactions of the Royal Society 368; James Manyika and others, 'Big data: The next frontier for innovation, competition, and productivity' (2011) McKinsey Global Institute; Paul Zikopolous and Chris Eaton, *Understanding Big Data: Analytics for Enterprise Class Hadoop and Streaming Data* (McGraw-Hill Osborne 2011); Andrew McAfee and Erik Brynjolfsson, 'Big Data' (October 2012) Harvard Business Review 59; Ian H Wilton, Eibe Frank, *Data Mining: Practical Machine Learning Tools and Techniques* (2nd edn, Elsevier 2005); Jiawei Han, Micheline Kamber, and Jan Pei *Data Mining Concepts and Techniques* (3rd edn, Elsevier 2012).

[47] See, for example, Department for Business, Innovation and Skills, 'Digital Britain: Final Report' (2009).

[48] Eefke Smit and Maurits van der Graaf, 'Journal Article Mining, A research study into Practices, Policies, Plans ... and Promises.' (2011) BV Bronfonteyn.

numbers – less than ten per year, or even less than five per year for research.[49] It also found that 90% of research-focused requests received permission, with only 28% of respondents having no stated policy on mining requests. 68%of respondents considered mining requests on a case-by-case basis, with 88% of publishers allowing mining in some or the majority of cases.[50] This study was not based solely on the UK, but focused on a global scale, and considered several possibilities for creating common, cross-publisher solutions to the mining difficulties. It offered five possibilities, the most popular of which was 'standardization of content formats for mining, of API-standard platforms, of basic semantics tagging terms, etc.'[51] – this would allow publishers to continue to handle their own permissions, but would remove some of the difficulties of mining content from several publishers by standardising formats across publishers.[52] It is worth noting that none of the options suggested included a legislative change. The PRC also commissioned a second study on the topic of TDM, which was published in 2013. The second report, 'Text Mining and Scholarly Publishing' was produced by Jonathan Clark, an independent advisor on strategy and innovation.[53] It stated that requests for text mining permissions remained, at the time, relatively infrequent, but that they were expected to increase in the coming years.[54] Of course, the fact that both of these reports were commissioned by a publishing group must be considered when considering the possibility of bias. The use of third-party research groups goes some way to negating the possible accusations of bias, but it is hardly likely that a publishing group would publicise a report which did not support their position. Nonetheless, they were the only publications available which considered the available solutions to the issue of text and data mining in the UK at the time. This issue was not so pressing in the wider European context, discussed later in the chapter, where several reports considered the possible formations and implications of a TDM exception.

Another project which offered evidence on the proportion of publishers allowing mining access to their content was the UCSC Genocoding Project.[55] This Californian project attempted to map genomic identifiers to the human genome by crawling published papers – using a computer system to mine the papers for the relevant information. In order to achieve this, however, it was necessary to seek the permission of the publishers. The UCSC Genocoding project kept track of the

---

[49] ibid 4.
[50] ibid 5: 35% allowed mining requests in the majority of cases, with 53% allowing in some cases.
[51] ibid 14.
[52] ibid 58-59.
[53] Clark (n 31).
[54] ibid 13.
[55] UCSC Genome Bioinformatics, 'Genocoding Project' (*UCSC Genocoding)* <http://text.soe.ucsc.edu/index.html> accessed 18 December 2015.

responses it received to its letter requesting permission to crawl articles, which was sent via email to multiple publishers.[56] The project then published those responses, both positive and negative, on its website.[57] Of the 43 publishers listed on the website, 28 permitted crawling access, and 15 either denied permission or did not respond – a 65% positive response. The letter was sent in early 2012, and those that did respond did so before the end of 2012. Thus, it is clear that, while crawling and other TDM requests were not particularly common at the time, publishers could and usually did deal with them, both granting and denying licensing requests.

Similarly, the submissions to the Hargreaves review point out incidences in which content owners included clauses in contracts about mining – for example, the National Centre for Text Mining pointed out that both JISC Collections and LicensingModels attempted to account for TDM in their licences as early as 2010.[58] While this submission did state that the provisions were inadequate, the market at the time was, and indeed still is, nascent, and thus must be allowed time to adjust and find the ideal economic balance.

As TDM became more popular, publishers began to implement solutions which made obtaining licences easier for those wishing to mine or crawl content. Several publishers implemented policies that allowed researchers to mine their content; Elsevier was one of these, provided crawlers did so through Elsevier's proprietary API[59] system. This allowed Elsevier to maintain some control over server load regarding their publications, but still permitted researchers to mine content.[60] This system, however, was not entirely well-received by researchers, as it required researchers to mine only Elsevier content at any one time – part of the advantage of TDM is that it can analyse data from a variety of publishers, and a proprietary API system conflicted with this.[61]

---

[56] UCSC Genome Bioinformatics, 'Open Letter to Publishers' (*UCSC Genocoding)* <http://text.soe.ucsc.edu/email.html> accessed 11 March 2015.
[57] UCSC Genome Bioinformatics, 'Progress' (*UCSC Genocoding)* <http://text.soe.ucsc.edu/progress.html> accessed 11 March 2015.
[58] National Centre for Text Mining, 'Text Mining and IP: Submission to the Independent Review of IP and Growth from the National Centre for Text Mining' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-nctm.pdf> accessed 17 March 2015.
[59] An Application Programming Interface (API) is a set of rules and protocols which dictate how software will operate. In the case of mining, publisher-specific APIs restrict researchers from developing their own software for mining, and force them to use the system established by the rights holder.
[60] Chris Shillum, 'Elsevier updates text-mining policy to improve access for researchers' (*Elsevier*, 31 January 2014) <http://www.elsevier.com/connect/elsevier-updates-text-mining-policy-to-improve-access-for-researchers> accessed 12 March 2015.
[61] Peter Murray-Rust, 'Content Mining: Why you and I should NOT sign up for Elsevier's TDM service' (*PeterMR's Blog*, 31 January 2014) <http://blogs.ch.cam.ac.uk/pmr/2014/01/31/content-mining-why-you-and-i-should-not-sign-up-for-elseviers-tdm-service/> accessed 17 March 2015.

However, even this issue has been making progress in the years leading up to the implementation of the exception – CrossRef, a digital object identifier (DOI) system, integrated support for data mining into their system, which allows researchers to request permissions for a variety of articles from publishers, thus cutting down the amount of time required to successfully obtain full-text access to content.[62] Similarly, the Publishers Licensing Society, a CMO which already administered collective licensing in the UK, developed a system called PLSclear[63] which identifies rights holders and allows potential reusers to request licensing through an automated system. This was further developed to a TDM-specific engine, PLSclear TDM, which allows up to 100 DOIs to be entered at a time, cutting the time required to obtain permissions down substantially.[64] If given time to develop, it is more than feasible that similar systems would have proliferated, leading to a functional and effective system, giving researchers a choice of services without the need for legislative intervention.

Nonetheless, in late 2011 the government accepted Hargreaves' recommendations in full.[65] This then led, inter alia, to the implementation of a variety of exceptions to copyright,[66] and the establishment of the Copyright Hub.[67] The TDM recommendation took the form of a section of a Statutory Instrument enacted in 2014.[68]

Implementation

Coming into effect on 1 June 2014, The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations[69] inserted a new section into the Copyright, Designs and Patents Act 1988.

> 29A Copies for text and data analysis for non-commercial research

---

[62] CrossRef <http://www.crossref.org/> accessed 12 January 2016; for more information, see CrossRef, 'Text and Data Mining for Researchers' (*CrossRef*) <http://tdmsupport.crossref.org/researchers/> accessed 17 March 2015.
[63] PLSclear <http://www.plsclear.com/> accessed 18 December 2015.
[64] PLSclear TDM <http://plsclear.com/Pages/ClearTDMWizard.aspx> accessed 26 March 2015.
[65] HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (2011).
[66] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372; The Copyright and Rights in Performances (Disability) Regulations 2014, SI 2014/1384; The Copyright (Public Administration) Regulations 2014, SI 2014/1385; The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356; The Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361.
[67] Discussed in the introduction and Chapter 7.
[68] The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372.
[69] ibid.

> (1) The making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that—
>
> (a) the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose, and
>
> (b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).
>
> (2) Where a copy of a work has been made under this section, copyright in the work is infringed if—
>
> (a) the copy is transferred to any other person, except where the transfer is authorised by the copyright owner, or
>
> (b) the copy is used for any purpose other than that mentioned in subsection (1)(a), except where the use is authorised by the copyright owner.
>
> (3) If a copy made under this section is subsequently dealt with—
>
> (a) it is to be treated as an infringing copy for the purposes of that dealing, and
>
> (b) if that dealing infringes copyright, it is to be treated as an infringing copy for all subsequent purposes.
>
> (4) In subsection (3) 'dealt with' means sold or let for hire, or offered or exposed for sale or hire.
>
> (5) To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.[70]

This section sits under the umbrella of the general 'Research and Private Study' section of the Act, and does not distinguish between different types of work, meaning that mining and data analysis can be carried out on any kind of copyright work. This is in keeping with the other amendments to the Act, which omit the words 'literary, dramatic or musical' in favour of simply referring to a

[70] ibid reg 3.

'work'.[71] Subsection (5), which states that the TDM provision may not be circumvented by means of a contract term, is in keeping with all the exceptions implemented in 2014, which have similar statements making the full range of exceptions immune from contractual override.[72]

Effect since implementation

The implementation of the exception for non-commercial TDM meant that there was no longer a need for non-commercial researchers (including those engaged in universities and other third-level institutions) to request permission to perform TDM on any works to which they have lawful access. This then increases the potential for TDM, as it is no longer as arduous or time-consuming as it would have previously. The elimination of the requirement to search for each individual copyright-holder and request permissions made TDM a more viable research method for a variety of researchers. This means that, as awareness of TDM grows, more researchers will consider it a viable research method, leading to the discovery of new information and greater analysis of the vast swathes of data available in the digital age. Although publishers no longer have any control over whether or not their content may be mined for data analysis purposes, they maintain the option to deny any access to the work at all – researchers are required to have 'lawful access' to the work before they may copy it for TDM purposes.[73] Publishers are also allowed to impose restrictions in order to maintain the stability or security of their network (eg by limiting downloads to a certain number per month) but these measures must not unreasonably restrict researchers' access to the works.[74] The exception also had the effect of denying publishers the chance to monetise non-commercial TDM requests. However, it is not outside the bounds of imagination that publishers may simply incorporate the costs of supporting non-commercial TDM into their licence fees for access, given that the right of access includes the right to mine.

With regard to commercial exploitation of TDM techniques, this remains the province of individual publishers. Thus, they may create or decline to create systems which will allow commercial researchers to mine content, provide APIs, partake in joint initiatives such as CrossRef[75] or PLSclear TDM,[76] or simply refuse all TDM applications entirely. However, given

---

[71] ibid reg 3(1)(a).
[72] See, for example, The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356, reg 3.
[73] CDPA (n 35) s 29A(1).
[74] IPO, 'Exceptions to Copyright: Research' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375954/Research.pdf> accessed 25 March 2015, 6.
[75] CrossRef (n 58).
[76] PLSclear TDM (n 60).

the proportion of TDM requests which were non-commercial and now no longer need to be supported, it is not outside the bounds of possibility that the implementation of the non-commercial TDM exception has disincentivised publishers and content owners to create systems which can deal with requests for commercial TDM permissions in a timely and efficient manner. Nonetheless, as TDM continues to grow, it is in publishers' best interests to develop procedures that can efficiently issue TDM permissions – this may take the form of publisher-specific initiatives, or joint projects between multiple publishers. It is important, however, that publishers and rights holders are allowed to retain the freedom to control the commercial exploitation of their works – including permitting or denying copying for the purposes of data mining and analysis. To do otherwise would be to undermine the integrity of copyright rules entirely.

One area of potential confusion which may arise is due to the fact that there is no clear delineation of the distinction between commercial and non-commercial research given in the legislation. While a common-sense approach would seem to be the most likely approach which will be taken, it is an area which may yet lead to a certain amount of litigation before the courts as to what exactly constitutes non-commercial research, and to what degree such researchers can rely on the TDM exception. For example, a university researcher who conducts research using TDM techniques is likely to fall within the exception, especially if the results of their research are published in a scientific journal, usually for no fee. In fact, if the research is published under certain Open Access protocols, the researcher may even be required to pay a fee in order to publish their research.[77] This is clearly not a commercial gain for that researcher. However, if their research then forms a chapter of a monograph, textbook, or other larger work for which royalties are payable, does this change the nature of the research? While the research may be the same, the method of publication in the latter case accrues a certain amount of financial gain. Thus, is the research no longer eligible to take advantage of the exception? This is a question which will have to be answered through litigation, as it is not explained in the legislation itself. One possibility is that a researcher who did not need to seek permissions to mine content originally would then have to retroactively seek a licence if they wished to subsequently publish for commercial reasons, but this would be particular to individual circumstances.

The exception is relatively new, and has not yet been subject to litigation. In the event of commercial research attempting to rely on the TDM exception, it would be interesting to consider which aggrieved party would take a suit against the commercial researcher. For each individual

[77] For more on Open Access, see Chapter 7.

author, if the amount of data analysed was large, then the degree of use of their copyright would be so minute that it may not accrue more than nominal damages. In that case, then, the most likely parties to take a case against commercial miners would be publishers or licensing societies. Much like the NLA, the licensing society for newspapers in the UK, was the body which took a case against news clippings services,[78] it would not be outside the bounds of imagination to suggest that licensing societies would again be the most logical avenue for litigation against TDM infringement. However, this of course, is conjecture, and remains to be seen.

Naturally, TDM requests are not limited solely to publishers – there are data resources which could provide great insights and scientific developments if mining of the content were permitted. For example, while mining the scientific literature and published articles about the use of a specific drug could provide new data on potential side effects, a much wider source of information on this could be found in the NHS patient records. Therein one would find a comprehensive record of the effects of a particular drug on numerous patients and, were mining of that content allowed, new uses for drugs could be discovered with relative ease. However, the mining of data sources other than those which are commercially available (ie those to which a subscription may be purchased) is something outside of the ambit of the current exception. Thus, it does nothing to enable the progression of knowledge in areas other than specifically non-commercial TDM with data which may be lawfully purchased or obtained, and therefore fails to account for much data which could be the source of new scientific insights. This use of TDM may well be one which is impossible to license, and thus could be a potential case for a second TDM exception, but it is one which must be carefully researched and defined before legislation is enacted.

In August 2015, the UK Publishers Licensing Society conducted a survey of its members regarding the use of the TDM exception.[79] Of those publishers who responded to the survey, less than 20% stated that they had received mining requests.[80] The survey covered the number of requests to mine which were received in the year 2014, and the overall number of requests from 111 publishers was just 91.[81] Although there is no data for why this number is so low, the PLS suggested that it may have been due to licence terms including permissions to mine content, and the use of

---

[78] NLA Media Access, 'Newspaper Websites – Copyright Law' (2014) <http://www.nlamediaaccess.com/uploads/public/News/Summary%20of%20Legal%20Proceedings%20-%20Background%20for%20Journalists%20_June_2014.pdf>accessed 12 January 2016.
[79] Publishers Licensing Society, 'Survey shows text and data mining supported by licensing not copyright exceptions' (*PLS News and Events*, August 2015) <http://www.pls.org.uk/news-events/n-tdm-august-15/> accessed 18 October 2015.
[80] ibid.
[81] ibid.

automated systems, such as CrossRef, which allow researchers to access material for TDM purposes without having to contact the publishers directly.[82] This low instance of requests for TDM permissions was not expected to rise greatly in the future, nor had it seen a notable rise or fall with the implementation of the UK TDM exception. It is suggested that the existence of automated services such as CrossRef, PLSclear TDM, and the Copyright Clearance Center, may well have negated the need for a TDM exception at all.[83]

However, it is important to note that as of the date of conclusion of the research project, an independent research project had not been completed on the effect of the TDM exception in the UK. It is wise to note that figures reported by an organisation such as the PLS may be open to accusations of bias, and thus should be treated with some scepticism, and an independent project would be advisable for greater reliability.

Calls for wider exception in Europe

The movement toward TDM was not isolated to the UK. Across the EU, there was also a realisation of the growing need to acknowledge TDM as a research method, and consider the need for legislation to regulate the use of TDM. This resulted in the creation of a TDM working group in the Licences for Europe initiative, which was established in December of 2012 and launched the following February.[84] Unfortunately, the working group did not proceed as successfully as had been hoped. In February 2013, a number of participants of the working group – mostly librarians – walked out, on the basis that the scope of the group was not wide enough to adequately account for the possibilities of TDM. They set out their concerns in a letter to the relevant Commissioners (Barnier, Geoghegan-Quinn, Kroes, and Vassilou) later that same month, arguing that the group considered only re-licensing content, and not a wider variety of solutions to the TDM quandary, including exceptions or limitations to copyright law.[85]

---

[82] ibid.
[83] ibid.
[84] Michel Barnier, 'Licences for Europe: quality content and new opportunities for all Europeans in the digital era' (Speech at the Launch of the initiative 'Licences for Europe', 4 February 2013) <http://europa.eu/rapid/press-release_SPEECH-13-97_en.htm> accessed 18 December 2015.
[85] ––, 'Letter from participants in response to "Licences for Europe- A Stakeholder Dialogue" text and data mining for scientific research purposes workshop' (February 2013). Signatories were Sara Kelly, Executive Director, The Coalition for a Digital Economy Jonathan Gray, Director of Policy and Ideas, The Open Knowledge Foundation John McNaught, National Centre for Text Mining, University of Manchester Aleks Tarkowski, Communia Klaus-Peter Böttger, President, European Bureau of Library Information and Documentation Associations (EBLIDA) Paul Ayris, President, The Association of European Research Libraries (LIBER) Brian Hole, CEO, Ubiquity Press Ltd. David Hammerstein, Trans-Atlantic Consumer Dialogue, and the letter was additionally supported by more than fifty other interested parties.

Nonetheless, the plenary group produced a pledge, one of the ten pledges for getting more content online which were published in December of 2013.[86] This stated that the group had achieved 'Easier text and data mining of subscription-based material for non-commercial researchers: a commitment by scientific publishers' in the form of a proposed licensing clause which allowed for TDM at no extra cost for non-commercial research. At the date of publication of the ten pledges, thirteen publishers had signed up to include this licence term.[87]

Despite the pledges, this did not appear to be a sufficient movement towards enabling TDM, and thus in 2014 a veritable plethora of reports were commissioned and published by two European Directorates-General (DGs), focusing on TDM. DG Research and Innovation published the Hargreaves-led Expert Group's report 'Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining',[88] while DG Market commissioned and supported March's De Wolf and Partners 'Study on the legal framework of text and data mining (TDM)'.[89] A third report from 2014, 'Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU: Analysis of specific policy options' from Charles River Associates (CRA), was also supported by DG Market.[90]

While these three reports were all published in the same year, they came to markedly different conclusions about the need for a TDM exception, and indeed the wider copyright system. While the Expert Group report from DG Research and Innovation called for an exception to copyright law, this was only a precursor to its recommendation to entirely overhaul the European copyright system. The De Wolf study from DG Market focused on the current legal framework, and whether TDM would fall under any of the exceptions which are currently mandated under European law. It concluded that TDM could not be permitted under any of the existing exceptions, and

---

[86] Licences for Europe, 'Ten pledges to bring more content online' (2013) <http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf> accessed 18 December 2015, 8.
[87] ibid 8.
[88] The Expert Group, 'Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining' (2014) <http://ec.europa.eu/research/innovation-union/pdf/TDM-report_from_the_expert_group-042014.pdf> accessed 18 December 2015.
[89] Jean-Paul Traille, Jérôme de Meeûs d'Argenteuil and Amélie de Francquen, 'Study on the legal framework of text and data mining (TDM)' (2014) <http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf> accessed 12 January 2016 (De Wolf and Partners).
[90] Julian Boulanger and others, 'Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU: Analysis of specific policy options' (2014) <http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf> accessed 12 January 2016 (Charles River Associates).

recommended that a TDM exception be put into place to remove 'unjustified obstacles'[91] to data analysis. The report by CRA, also DG Market, offered four ways to proceed regarding the question of TDM and relevant legislation, before recommending the implementation of a non-commercial exception for scientific research in circumstances where licences were not offered. This exception could be relied upon where it was not possible to obtain a TDM licence, but would cease to apply once a publisher began to offer TDM licences, thus incentivising publishers to create licensing terms in order to avoid falling subject to the exception.

The Expert Group[92] which was responsible for the DG Research report was led by Professor Ian Hargreaves, who was also responsible for the 2011 Hargreaves Review,[93] discussed earlier in the chapter. Within the Expert Group report, one finds the statement that prolific use of TDM would add tens of billions of Euros in value to the EU's aggregate GDP, but the important thing to note here is that this estimate is not based on empirical research. Indeed, '[t]here are no empirical estimates of the impact of TDM on the productivity effect of research',[94] and the figures proffered in the report were based on data from a JISC report[95] which applied only to the UK, and did not take into account either the variation between different European countries' research outputs or the unique position that the UK occupies as a research centre. Nonetheless, the Expert Group report then went on to use the JISC figure (of 2%) and apply this to the EU as a whole, to increase the real value of EU research output by €5.3 billion. It used an elasticity estimate from Guellec and Van Pottelsberghe's 2004 OECD economic study[96] to model the long-term impact of a change in the volume of R&D expenditure, which came out at a €32.5 billion increase in terms of innovative products, productivity and consumer welfare increases.[97] It did not, however, state over what

[91] DeWolf and Partners (n 85) 116.
[92] The Expert Group was assembled for the purposes of the report discussed in this chapter. It was composed of Professor Hargreaves, of Cardiff University, Dr Lucie Guibault (University of Amsterdam, the Netherlands), Dr Christian Handke (University of Amsterdam and Erasmus University, the Netherlands), Professor Peggy Valcke (KU Leuven, Belgium) and economist Bertin Martens (JRC, IPTS, Seville). They were supported by Dr Ros Lynch (Department for Business Innovation & Skills, United Kingdom) as rapporteur. It further received research assistance from Dr Sergey Filippov, Assistant Professor of Innovation Management at Delft University of Technology and Non-resident Fellow of the Lisbon Council.
[93] Hargreaves (n 12).
[94] Expert Group (n 84) 33.
[95] ibid 25.
[96] Dominique Guellec and Bruno Van Pottelsberghe, 'From R&D to Productivity Growth: Do the Institutional Settings and the Source of Funds of R&D Matter?' (2004) CEB Working Paper No 04/010.
[97] Expert Group (n 84) 33.

length of time this long-term increase would apply. In addition, this would be a minor increase in terms of proportion of EU GDP – only 0.26%.

On the back of these assertions, the report proposed three action points, the first of which was licensing initiatives.[98] The second was a wide-ranging exception for TDM, which removed it entirely from the scope of European copyright and database law.[99] This was, however, an interim suggestion, to be implemented pending the progress of the paper's third suggestion, a large-scale reform of European copyright law.[100]

The Expert Group dismissed almost out of hand the possibility of licensing options, citing the needs of digital age researchers, who 'require legally reliable research access to many types of database, spread across numerous media platforms, disciplines, organisations and countries'.[101] While this is not untrue, to dismiss the possibility of licensing is to deny rights holders a level of control over their protected works, and also fails to take into account joint enterprises such as the aforementioned PLSclear TDM engine and CrossRef.

With regard to a TDM exception, the report came to some of the same conclusions that will be put forward later in this chapter. The distinction between commercial and non-commercial research can, at times, be hard to make. Further, the definition of 'scientific' is also difficult to ascertain. The report concluded that the only viable exception would be one which applied to all scientific researchers, both commercial and non-commercial, in order to avoid confusion, and to improve the status quo.[102] However, the distinction between copying expressive works and the incidental copying which occurs as part of the data analysis process would still be difficult to draw. It is on the basis of this difficult distinction that the report's made its ultimate recommendation – a new Copyright Directive.[103] Thus, while it recommended the implementation of a 'specific and mandatory exception to remove text and data mining for scientific purposes from the reach of European copyright and database law',[104] this was only to be considered as a medium-term amelioration pending the new copyright Directive.

This recommendation, however, was incomplete – it was a recommendation that did not take into account the nuances involved in scientific research. While the distinction between scientific non-

[98] ibid 65.
[99] ibid 66.
[100] ibid 67.
[101] ibid 65.
[102] ibid 68.
[103] ibid 68.
[104] ibid.

commercial research and commercial research can be difficult to make, to create an exception which applied to all scientific research would be heavy-handed and would not take into account the distinction in purpose behind commercial and non-commercial research. Further, the recommendation of the exception also failed to consider the crucial forerunner of whether or not the researching party would have lawful access to the material to be analysed. To allow TDM without lawful access to material would be overreaching on the part of the legislature, which, rather than enhancing the value of European scientific research, could undermine it entirely. As has been established many times throughout this thesis, copyright walks a balance between access and incentive, and distinctions such as lawfully owning a content of work to be analysed would be a vitally important one in maintaining that balance.

The second study,[105] by De Wolf and Partners,[106] assessed the legal framework of TDM in Europe. It considered the possibility that data analysis could fall under the current copyright and database legislation, before concluding that this would largely be impossible.[107] It did point out that TDM, in part, could be justified under existing exceptions, as a part of non-commercial scientific research, but the lack of a specified exception could lead to confusion for researchers. It stated very clearly that more research would be needed, due to the fact that TDM as a research tool was so new.[108] It then moved on to consider the possible construction of a new European data mining exception, taking guidance from existing legislation in the InfoSoc Directive,[109] and the Database Directive[110] and their provisions on both copyright and *sui generis* rights.[111] The recommendation of the report was that, if a TDM exception were to be implemented, it should apply to non-commercial research which is mainly scientific in purpose, and that any requirement to acknowledge the source should be left to individual data miners.[112] The report further suggested, inter alia, that such an exception should be made mandatory across all member states, unlike the InfoSoc exceptions, as this would lead to greater harmonisation in the EU, and would also simplify the possibilities of cross-border research,[113] and lastly suggested that it should not be possible to

[105] De Wolf and Partners (n 85).
[106] De Wolf and Partners is a Belgian/Luxembourgish legal firm that specialises in corporate, commercial, TMT, tax, employment and real-estate law. It often produces high-level European reports, including in the area of intellectual property reform.
[107] De Wolf and Partners (n 85) 41-84.
[108] ibid 96.
[109] InfoSoc Directive (n 1).
[110] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.
[111] De Wolf and Partners (n 85) 99.
[112] ibid 100.
[113] ibid 107.

override the exception by contract, much like the UK exceptions discussed earlier in this chapter.[114]

The De Wolf and Partners report was cautious in its approach, and extensive in its analysis, both of the current law, and the potential for change. Its suggestions were built on the need for further research into the area, and considered also the need for balance in the implementation of any new exceptions. This author disagrees with the need for a mandatory pan-European exception, especially given that the scientific research exception in InfoSoc has not been uniformly implemented, but respects that this would lead to greater clarity and more ease of cross-border research across the EU.

The third report, by Charles River Associates (CRA),[115] was not limited solely to considering TDM. Rather, it considered a variety of possible exceptions to copyright law, including remote access, private copying, TDM, and library e-lending. It considered the licensing context in the EU at the time, and pointed out that for each possible TDM project, the time input in contacting the rights holder in order to seek permission to mine would be considerable.[116] As well as this, many publishers had not yet developed TDM licences and thus the costs associated with obtaining a TDM licence could vary. This uncertainty could then make undertaking mining projects difficult, time-consuming and intimidating. The study made a strong point, however, in pointing out that the market for TDM licences was nascent – publishers could not be expected to have developed licences to feed a demand that did not exist only a few short years previously.[117] It further pointed out that there was no empirical evidence which stated the demand for TDM licences.[118] However, the market was already adapting, as initiatives which have already been mentioned, such as PLSclear TDM, CrossRef's automated TDM initiative, and the commitment by scientific, technical and medical (STM) publishers to a standard TDM licence indicated.[119]

The study assessed four separate policy options for TDM:

1. Maintaining the status quo for TDM

---

[114] ibid 106-113.
[115] Charles River Associates is a global consulting firm, headquartered in Boston, which offers economic, financial and strategic consulting to major law firms, corporations, accounting firms, and governments around the world.
[116] Charles River Associates (n 86) 16-17.
[117] ibid 70.
[118] ibid 65.
[119] ibid 70.

2. A specific harmonised and mandatory exception for text and data mining for the purpose of non-commercial scientific research in the absence of a licence agreement enabling text and data mining
3. A specific harmonised and mandatory exception for text and data mining for the purpose of non-commercial scientific research
4. A specific harmonised and mandatory exception for text and data mining for the purpose of scientific research (both commercial and non-commercial)[120]

Each of these four options was individually assessed, with the research concluding that options 3 and 4 (both of which were non-overridable exceptions) would not be warranted.[121] It is worth noting that option 3 would be an extension to the entire EU of the situation which was in place in the UK since the implementation of the new TDM exception in 2014. The report made the point that, especially with regard to an exception which was both commercial and non-commercial, removing the potential for financial gain from TDM would then disincentivise publishers from developing the TDM-specific structures which would allow TDM to flourish, and further benefit the EU as a whole.[122] This exception, which at first glance seemed nothing but positive, could then lead to more difficulty in utilising TDM techniques. With regard to option 1, the report pointed out that maintaining the status quo could leave high transaction costs in place. It did acknowledge that new developments were emerging and maintaining the status quo could still encourage investment in TDM infrastructure.[123] It did not state that maintaining the status quo would be impossible, or even undesirable, but maintained that it would not be the most preferable outcome for Europe.[124]

The recommendation which received highest priority was the implementation of a specific harmonised and mandatory exception for TDM for the purpose of non-commercial scientific research in the absence of a licensing agreement enabling TDM.[125] This exception, option 2, in contrast to options 3 and 4, could be over-ridden by the implementation or offering of a licence by a rights holder. This would apply only where there was lawful access to the content being mined – ie where the researcher or research institute had a subscription to a particular database. This option would still allow publishers to provide licences for TDM, but would not prevent researchers from accessing content where a publisher did not offer licences for TDM. It was suggested in the study that this would have little to no effect on larger publishers, as they had established licences

[120] ibid 74-81.
[121] ibid 78, 80.
[122] ibid 72.
[123] ibid 74.
[124] ibid.
[125] ibid 81.

for TDM (particularly for scientific purposes) and thus the exception would not apply.[126] It was further suggested that the exception would also encourage smaller publishers to amend their subscription agreements in order to add mining clauses, meaning that the effect on them would be limited only for as long as they had not yet included or provided such a licence. It pointed out also that content from smaller publishers was less frequently mined than that from larger publishers.[127] The study lastly suggested that the loss of revenue by publishers affected by the exception would encourage them to develop licences, leading to lower transaction costs in the future.[128]

The detriment felt by the implementation of option 2 over maintaining the status quo would be limited, in that it would likely affect only smaller publishers, and even then only until they produced their own TDM licences. The increased production of TDM licences, the report suggested, would then likely reduce transaction costs.[129] The recommendation would ensure that researchers were able to mine content, even where there was no licence available, but also maintain rights holders' incentives, allowing the market the freedom to set its own rates. This would be an improvement over the status quo, as it would allow rights holders to develop their own TDM clauses, but also require that permission to mine be made available to researchers. This minimal level of intervention would allow the market to develop its own solutions in time, while still providing encouragement for rights holders.[130]

Of course, the discussion of TDM has not been limited solely to reports commissioned by legislators. Other interested parties have also been making their opinions known, across Europe. By way of example, in July 2014 the French Council for the Protection of Literary and Artistic Property (CSPLA)[131] published the report of their 'Mission sur l'exploration de données',[132] proffering their opinion that legislative initiative on TDM would be premature, and the market should be encouraged to develop its own licensing solutions.[133]

---

[126] ibid 75.
[127] ibid 75.
[128] ibid 75-6.
[129] ibid 76.
[130] ibid 77.
[131] More correctly, 'Conseil supérieur de la propriété littéraire et artistique', but translated to English for ease.
[132] Jean Martin and Lilian de Carvalho, 'Mission sur l'exploration de données' (July 2014) <http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux-du-CSPLA/Missions/Mission-du-CSPLA-relative-au-text-and-data-mining-exploration-de-donnees> accessed 30 March 2015.
[133] ibid 4-5.

The Mission report, written by Jean Martin and Liliane de Carvalho, gave first a description of TDM, with specific reference to the subject matter concerning the CSPLA (that is to say, artistic and literary works), pointing out that the area had been slower to adapt than scientific journals, and had adapted differently – the notion of Open Access meant that for 50% of journal articles, mining was already permitted.[134] The report then went on to note that the authorisation of rights holders, without legislative intervention, was still required for mining activities, presenting a logistical problem where the quantity of objects to be mined was great.[135] However, it also noted that the value of TDM was more than that of a parasite – TDM could potentially create and add further value, justifying the use of TDM techniques.[136] Thus, it suggested, a balance must be struck between the often intimidatingly high transaction and administrative costs and the value that TDM could create in the future. It also praised the Licences for Europe movement, mentioned earlier in this chapter, which created a standard TDM clause, along with commitments to implement this licence by multiple publishers.[137]

The discussion of TDM in this report is as extensive as those commissioned by the European DGs, but considered from a different angle. The final product of the report was that it made twelve recommendations, aimed at various different aspects of TDM, from changing the perception of TDM from parasitic to symbiotic, to creating a public policy designed to manage the specific rights required for mass use of works for TDM, including prioritising self-regulation over legislative intervention, allowing access to public data for TDM, and maintaining that non-legislative conviction within the European Union and WIPO structures.[138] The report also recommended that a two-year deadline be set to prepare an industry report on the possibility of an eventual need for legislative intervention, but maintained that legislative intervention at the point of publication (July 2014) would be premature. A move towards legislation is easy to implement, but hard to retract, and the recommendations of the CSPLA report, which included a review in two years, would allow the market enough time to adapt to what was still a very new development, while showing a willingness to co-operate with miners, reusers, and content adaptors in the future. The CSPLA report was indicative of the willingness of rights holders to engage with content miners, and come up with solutions to allow greater use of TDM, but also demonstrates the reluctance to embrace a mandatory legislative exception to TDM – this would remove all

[134] ibid 10.
[135] ibid 16.
[136] ibid 18.
[137] ibid 6.
[138] ibid 4-5.

incentives for rights holders to cooperate in any way, and may then damage the prospects of TDM in the future.

Another viewpoint worth considering is that of librarians. As mentioned earlier in this chapter, librarian representatives walked out of the 2013 Licences for Europe working group on TDM, as they felt their concerns were not being heard.[139] The European Association of Research Libraries, (LIBER)[140] continued to campaign for a European TDM exception, including in their response to the 2014 European Consultation on Copyright.[141] In February of 2015, former LIBER president Paul Ayris met Commissioner Oettinger, the Commissioner for Digital Economy and Society, to campaign for a mandatory, pan-European, non-overridable TDM exception to European copyright law, citing issues of cross-border work and damaging the European single market if this were to be left to individual Member States to implement, like the InfoSoc copyright exceptions.[142]

The variety of opinions available from interested parties, librarians, researchers, content owners and independent research bodies meant that the European Parliament had a fine line to walk in order to reach a solution acceptable or at least tolerable to all interested parties, which would continue to promote European growth, research and profitability. The benefits of effective TDM are difficult to quantify in either financial or public good terms, but there seemed to be little disagreement that there was distinct potential. Thus, on such a hot-button topic, Europe was under an intense amount of pressure to find a solution which would result in maximised benefits through the effective use of TDM, and it seems that there is no easy answer to this quandary.

Conclusion

Text and data mining is a research tool that has the potential to speed up research in all areas of life, with possible untold benefits for all interested parties. However, enabling free use of TDM is fraught with issues, as it must walk a line between the interests of researchers and content owners, while preserving the free market. There are many issues that could arise with the implementation of a TDM exception, which may need some guidance before the exception could come into effect.

---

[139] Letter from participants (n 81).
[140] LIBER actually stands for Ligue des Bibliothéques Européenes de Recherche.
[141] LIBER, 'LIBER Response to the Public Consultation on the review of the EU copyright rules' (2014) <http://libereurope.eu/wp-content/uploads/Public%20Copyright%20Consultation%20Response.pdf> accessed 30 March 2015.
[142] Paul Ayris, 'LIBER Argues For Pan-European TDM Exception' (*LIBER*, 23 February 2015) <http://libereurope.eu/blog/2015/02/23/liber-argues-for-pan-european-tdm-exception/> accessed 30 March 2015.

For example, there may be difficulty in defining what exactly scientific research is, and it is not suggested where such a definition or distinction should come from. The layman's understanding of scientific research would suggest testing of a hypothesis within the hard sciences – so-called for their quantifiable data produced, testable and reproducible via the scientific method, generally understood as being the natural sciences (astronomy, biology, chemistry, earth science, and physics). Of course, this definition could also be expected to include STEM subjects (science, technology, engineering, and maths) or STM (scientific, technical, and medical) research. It is clear that even within the constraints of hard science, there is the possibility for variation between subject areas. Nonetheless, the layman's understanding fails to take into account the possibility to open to expand the term scientific research to its broadest possible interpretation, which could encompass also soft sciences, which could include social science, political science, and psychology.[143] Social science in particular is an expansive area, encompassing economics, history, anthropology, law, linguistics, geography, education, and more subject areas.[144] A narrow definition of scientific research would prevent many university and third-level non-commercial researchers from taking advantage of any potential exceptions or initiatives for scientific research, which would, in all likelihood, be a misinterpretation of the intention behind any exception. Furthermore, as the De Wolf and Partners report pointed out, limiting a TDM exception to solely scientific research would prevent many projects which have as their main aim scientific research from completing the entirety of their project, as secondary objectives which may veer more toward market research would not fall under the exception.[145]

A second problem to be tackled would be the issue of delineating between commercial and non-commercial research. Such a distinction would likely be difficult to draw, and guidance would need to either be vague, in the form of general principles, or very specific – even still, it is certainly not outside the bounds of imagination that a lack of clarity would lead to researchers relying on an exception which may not apply to them, if they are 'fringe' cases.

The suggestion of implementation of an exception for TDM could be considered as premature. According to guidance from the Green Book, exceptions to copyright law should only be

[143] For a discussion of some of the differences between hard and soft sciences, as well as a mention of the sometimes artificial distinctions between them, see Larry V Hedges 'How Hard is Hard Science, How Soft is Soft Science?' (1987) 42(2) American Psychologist 443.
[144] Norman W Storer, 'The Hard Sciences and the Soft: Some Sociological Observations' (1967) 55(1) Bull Med Libr Assoc 75.
[145] De Wolf and Partners (n 85) 62.

implemented where there is a market failure.[146] While the market for TDM is nascent, it has not failed entirely. It has not yet been given time to grow. There are multiple initiatives in place to provide licences for mining, both individually by publishers,[147] and through larger co-operative initiatives.[148] There is thus no immediately obvious need for an exception for publishers, and indeed implementing an exception could lead to further issues in distinguishing between scientific and non-scientific, and commercial and non-commercial research. Furthermore, rights holders are price discriminating, as stated in the CRA study – they often grant TDM licences free of charge to non-commercial researchers[149] and as the UK PLS survey stated, only a small proportion of publishers were receiving TDM requests, due to services such as PLSclear TDM and CrossRef and the inclusion of TDM clauses in standard licence agreements.[150] This then alleviated the difficulty of licensing which was faced by potential TDM users in previous years.

The suggestion made by multiple parties, including De Wolf and Partners and LIBER, that a potential exception should be mandatory for all EU Member States would lead to a scenario in which all member states would have an exception for TDM, but not for scientific research in general, as there is not yet harmonisation of all the InfoSoc exceptions across the EU.[151] This scenario would then mean that certain countries would be put in the situation where TDM is permissible, but other aspects of scientific research are not, a strange scenario by any reach of the imagination.

Finally, the increase in Open Access (OA) means that a large proportion of scientific research is already available under a licence which allows reuse and transformative uses.[152] In those circumstances, a TDM exception is redundant, as it does not place any onus on the rights holders to allow anything which they had not already allowed. Furthermore the UK requires that journal articles and conference proceedings published after 1 April 2016 must be made OA in order to qualify for the Research Excellence Framework, and encourages all institutions to implement an OA policy in advance of this date.[153] This means that most, if not all, university and third-level

---

[146] Green Book (n 3) 11.
[147] For example Elsevier has a mining API, and multiple publishers have signed up to the Licences for Europe standardised mining clause.
[148] PLSclear TDM (n 60) and CrossRef (n 58), for example.
[149] Charles River Associates (n 86) 64.
[150] PLS (n 75).
[151] Eleonora Rosati, 'Copyright in the EU: in search of (in)flexibilities' (2014) 9(7) JIPLP 585.
[152] Martin and de Carvalho (n 128) 10 suggested that more than 50% of journal articles were open access.
[153] HEFCE, 'Policy for open access in the post-2014 Research Excellence Framework' (July 2014) <http://www.hefce.ac.uk/media/hefce/content/pubs/2014/201407/HEFCE2014_07.pdf> accessed 30 March 2015.

researchers will make their research available OA online, negating the need for a TDM exception in order to mine this content. Similar policies may well be implemented across other parts of the EU, as the move towards OA is gaining momentum worldwide.[154]

As the non-commercial TDM exception in the UK has already been implemented, the issues of defining scientific research and non-commercial purposes may well be laid out for consideration in future case law. The existence of the UK TDM exception can act as a model, example, or even cautionary tale for the implementation of a wider European TDM exception. We can see from the implementation of this UK exception that there may well be no need for a European-level initiative to implement a new TDM exception, as it is possible to frame a TDM exception within the exceptions already permitted under the 2001 InfoSoc Directive (in the UK's case, under the exception for Research and Private Study).[155] Thus, the immediate implementation of a new instrument creating a TDM exception would be redundant. Any move toward a greater TDM exception in the EU should be approached thoughtfully and through a dialogue between stakeholders on all sides of the debate. The possibility of implementation of TDM exceptions in Member States under current legislation means that there is no need to rush to bring in a pan-European TDM exception, and thus legislators can afford the luxury of time, discussion, and careful consideration before deciding whether or not such an exception is a necessity.

In conclusion, while there may be criticisms made of the UK TDM exception, it may in the future prove to be a good test case in order to allow for greater consideration and careful planning of any potential implementation of a greater TDM exception in the EU as a whole. The wide variety of opinions and expert reports available on the topic of TDM, as well as the strongly-held and research-supported views of interested parties, including rights holders, researchers and other related parties such as libraries, mean that any legislative intervention on the topic of TDM in the EU should be carefully considered, using the UK as an example of how things may pan out in an EU environment. There is little doubt that TDM is an exciting and potentially game-changing research tool which may redefine the landscape of scientific research, but to heedlessly update copyright law without careful consideration of the delicate and nuanced balance which is required between rights holders and researchers could have adverse consequences which would counteract the financial and welfare benefits that TDM could offer. Furthermore, as a variety of research techniques, and applying to a range of types of data for assessment, TDM runs into further issues

[154] For more, see chapter 7.
[155] Of course, it is possible that this exception may be judicially reviewed, like the Private Copying exception, but this remains to be seen.

with regard to privacy, data protection, ownership of data, and myriad other issues which cannot be resolved with a blanket exception.

For these reasons, the author feels that a pan-European exception for TDM would be premature, and could detrimentally affect the development of TDM in Europe. Thus, empirical research should be conducted and carefully assessed before changes are made to the European copyright structure. This should focus on the possible implications of a mandatory exception against an optional exception, whether the exception applies to non-commercial only or all research, scientific, mainly scientific or all research, and whether it can be excluded through contract. The current framework allows individual member states to implement TDM exceptions if they so wish, and those who choose to do so will have the example of the UK to use as a framework on which to base their own exceptions. The author believes that the introduction of non-commercial scientific research exceptions for TDM across EU member states could be beneficial for all parties involved, both on the rights holder and researcher side, but without empirical evidence, this is only an opinion.

Furthermore, while TDM exceptions as suggested and discussed in this chapter may well improve access to scientific literature which is available through database and journal publication, there is a wealth of privately held data which would likely be more difficult to access, and thus could be a better case for a TDM exception. The lawful access requirement for the current TDM exception in the UK means that only data which is available for purchase can be mined. Thus, a carefully framed exception which improves access to other datasets, such as NHS patient records, may also be a candidate for consideration. Of course, given that this would also interact with issues of privacy and data control, it would be a more involved and lengthy process than an exception which contemplates only data which is available for purchase. Ultimately, though, it would be an exception which would be more beneficial not only to researchers, but potentially also to humanity as a whole.

While the UK TDM exception can be used as a test case, on the other hand, the implementation of the private copying exception can be used as a demonstration of how not to implement an exception. Despite the example of several other European countries' private copying levy schemes, the UK declined to include a similar levy scheme. They also employed flawed research and impact assessments, which wrongly denoted the amount of harm to rights holders which would result from such an exception. As such, despite the thirteen-year gap between the ability to implement

the exception[156] and its actual beginnings,[157] and the almost-four years from the publication of the Hargreaves Review[158] to the private copying exception's debut, this can still be seen as a cautionary tale as to the wisdom of failing to properly research the implications of certain exceptions. As a result, while there is still a market failure regarding private copying, there is now no private copying scheme in place in the UK, and no intention to rectify this.[159] Thus, in the future, the UK government must be sure to obtain objective and verifiable evidence of the effect of implementing exceptions to copyright before proceeding, lest the exception be quashed less than a year after its coming into effect.

[156] Via the powers of the InfoSoc Directive (n 1), which was 2001.
[157] The exception came into effect on 1 October 2014 (n 14).
[158] The Hargreaves Review (n 12) was published in May of 2011.
[159] Pinsent Mason, 'UK government scraps plans to legalise private copying' (*Out-Law.com,* 18 November 2015) <http://www.out-law.com/en/articles/2015/november/uk-government-scraps-plans-to-legalise-private-copying/> accessed 18 December 2015.

Chapter 7: Alternative Approaches to Copyright

Introduction

Beyond legislative solutions to copyright enforcement and simplifying copyright use, it is important to note the attitudes of content creators, content users, related parties in copyright, and also of government towards copyright. It is also worth pointing out the inherent flexibility of copyright, and its adaptability to new situations. Thus, this chapter looks firstly at some of the governmental attitudes towards copyright in late 2013-15 and considers the future regarding copyright reform. Following that, it considers some initiatives which show the inherent flexibility and possibility of the copyright framework, as well as discussing the cooperative initiative between industry and the City of London Police IP Crimes unit (PIPCU), known as Operation Creative.

By drawing on these diverse aspects of copyright enforcement and use, this chapter focuses on some of the possibilities which are achievable within the current copyright framework, without the need for extensive legislative reform. It shows the results that can be achieved when industry and enforcement are allowed to work together, and given sufficient time to adapt to new frameworks. It also highlights the creativity and adaptability of copyright creators, especially where existing frameworks are blocking access to, for example, scientific research.

Thus, what this chapter shows is both the policy attitudes which are visible at both a national and international level, and the possibilities and opportunities which are available through copyright as it currently stands. It concludes by offering a positive outlook as regards the future of copyright, that with some small tweaks, it can remain the effective, profitable, innovative and unique framework which has helped to guide, support, and remunerate content creators, content consumers, and other related interest groups for hundreds of years.

The digital shift changed how copyright works, especially published works, are accessed, distributed, and viewed, by researchers, consumers, businesses, and rights holders. The advent of digital was so rapid and all-encompassing that existing copyright and licensing structures were often unable to deal with it – prior distribution and licensing models were no longer appropriate to deal with the amounts of information created and exchanged through the internet every day.[1] This difficulty, combined with a change in attitude regarding the value of content, led to

[1] The amount of data available online is almost unimaginably huge. Each minute, 300 hours of footage are uploaded to YouTube, and less than 0.5% of all data is analysed. The potential is huge, and largely untapped. Bernard Marr, 'Big Data: 20 Mind-Boggling Facts Everyone Must Read' (*Forbes,* 30 September 2015) <http://www.forbes.com/sites/bernardmarr/2015/09/30/big-data-20-mind-boggling-facts-everyone-must-read/> accessed 18 December 2015.

complexities in the functioning of the digital copyright market in the early 21st century. The lack of free online availability of certain works, or the difficulty of legitimately obtaining them, led to a reluctance to engage with copyright works legally.[2]

This issue has been dealt with in many ways – the introduction of new legislation and enforcement mechanisms, as discussed in chapters three and four, as well as exceptions to copyright, as discussed in chapter six. This chapter considers some of the initiatives which have attempted to deal with the shift to digital in ways other than through blunt legislative instruments.

Governmental Attitude To Copyright

In order to understand the willingness or reluctance of governments to legislate (or otherwise) for new copyright provisions, it is important to consider both the actions and the declarations which are available to assess. We will consider first the attitude of the European Union bodies, the European Commission, the European Parliament, and the Court of Justice of the European Union (CJEU). It is only by considering these three arms of European governance that we can properly understand the development of copyright policy. This is followed by an assessment of the UK government's attitudes toward copyright in the 2010-2015 Conservative/Liberal Democrat coalition, and then comparing this to the early days of the following government.

European Union

The European Commission of course played a part in the shaping of copyright law in the UK and in the EU. The movement towards harmonisation across the 28 European Member States had an impact on UK copyright law, leading to the implementation of, inter alia, different copyright terms,[3] copyright exceptions,[4] and database rights,[5] through the application of several European Directives on copyright and related rights. As such, it is vitally important to understand the attitudes of the EU with regard to copyright. Thankfully, the Commission made this abundantly clear in 2014-15, by making copyright a key part of its Digital Single Market Strategy (DSM Strategy).

---

[2] For a light-hearted look at this, try Matthew Inman, 'I tried to watch Game of Thrones and this is what happened' (webcomic) (*The Oatmeal*) <http://theoatmeal.com/comics/game_of_thrones> accessed 18 December 2015.

[3] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12.

[4] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).

[5] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20.

In late 2013, the Commission launched a consultation on copyright, indicating its willingness to listen to suggestions from stakeholders.[6] The consultation lasted four months, from December 2013 until March 2014, and received almost 10,000 submissions.[7] In this time, an Impact Assessment (IA) was leaked, detailing four possible options for reforming the European copyright framework.[8] The IA did not state which option was preferred, and was marked for updating with the responses to the consultation. After the consultation had closed, but before the Commission released its report detailing the content of the responses,[9] a draft White Paper on copyright was leaked.[10] This paper set out the ambitions of the Commission with regard to copyright, concentrating largely on cross-border portability, and clarifying areas which remain unclear, such as hyperlinking, education and research (including TDM), disability provisions, and user-generated content. It was described as not being particularly ambitious,[11] and by the middle of July had been delayed until after the summer break.[12] This was then further hampered by the 2014 European Parliament elections – a complete change of leadership resulted in difficulty maintaining any kind of momentum after the consultation. Thus, after the summer break, the White Paper did not reappear, and was eventually abandoned. This consultation and leaked documents were also discussed in the literature review. However, in September of 2014, a working group was set up on

---

[6] Commission, 'Copyright – Commission launches public consultation' (Press Release, 5 December 2013) <http://europa.eu/rapid/press-release_IP-13-1213_en.htm?locale=en> accessed 18 December 2015.
[7] Commission, 'Public Consultation on the review of the EU copyright rules' (2013) <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm> accessed 13 January 2016.
[8] Commission, 'Draft Impact Assessment on the modernisation of the EU copyright acquis' (2014) <http://statewatch.org/news/2014/may/eu-draft-impact-assessment-copyright-acquis.pdf> accessed 13 January 2016.
[9] Commission, 'Report on the responses to the Public Consultation on the Review of the EU Copyright Rules' (2014) <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf> accessed 21 December 2015.
[10] Commission, 'A Copyright Policy for Creativity and Innovation in the European Union' (2014) (Draft) (White Paper) <https://dropbox.com/s/0xcflgrav01tqlb/White%20Paper%20%28internal%20draft%29%20%281%29.PDF> accessed 13 January 2016.
[11] Eleonora Rosati, 'SUPER KAT-EXCLUSIVE: here's Commission's draft White Paper on EU copyright' (*The IPKat,* 23 June 2014) <http://ipkitten.blogspot.co.uk/2014/06/super-kat-exclusive-heres-commissions.html> accessed 11 January 2016; LIBER, 'European Commission Thinks Again on Copyright White Paper' (*LIBER,* 23 July 2014) <http://libereurope.eu/blog/2014/07/23/european-commission-thinks-again-on-copyright-white-paper> accessed 11 January 2016; Nicholas Hirst, 'Barnier forced to delay copyright roadmap' (*European Voice,* 16 July 2014) <http://www.politico.eu/article/barnier-forced-to-delay-copyright-roadmap/> accessed 11 January 2016.
[12] Eleonora Rosati, 'BREAKING: Do not expect to read the EU copyright White Paper while on your summer holiday' (*The IPKat,* 17 July 2014) <http://ipkitten.blogspot.it/2014/07/breaking-do-not-expect-to-read-eu.html> accessed 11 January 2016.

Intellectual Property Rights and Copyright Reform,[13] designed to reflect on IPR issues, and pave the way for upcoming copyright reform.

In April 2015, a leaked Digital Strategy document indicated that copyright was one of the main concerns for the Commission in its future plans.[14] This was confirmed by the release of the DSM strategy on May 6 2015.[15] This announcement, taking the form of a Communication,[16] set out the plans of the Commission in creating a digital single market during its term.[17] This rested on three key pillars, under which were 16 key initiatives. Copyright reform was one of those sixteen initiatives, under the first pillar of 'Better access for consumers and businesses to digital goods and services across Europe'. The Communication proposed a modern, more European copyright law, in the form of legislative proposals before the end of 2015. These proposals, it stated, would

> improve people's access to cultural content online – thereby nurturing cultural diversity – while opening new opportunities for creators and the content industry. In particular, the Commission wants to ensure that users who buy films, music or articles at home can also enjoy them while travelling across Europe. The Commission will also look at the role of online intermediaries in relation to copyright-protected work. It will step up enforcement against commercial-scale infringements of intellectual property rights.[18]

From this, we can see that the Commission was certainly vocal about wishing to change and update European copyright. However, it was not the sweeping reform which was lobbied for; the actual change which was envisaged in the DSM strategy, and even that which was mentioned in the White Paper, was far less radical. It did not envisage a new copyright Directive, and focused on a select few issues. In December 2015, the Commission launched another public consultation, this time on the evaluation and modernisation of the framework for the enforcement of intellectual

---

[13] Working Group on Intellectual Property Rights and Copyright Reform, 'Subject files' (*European Parliament Committees,* 12 January 2016) <http://www.europarl.europa.eu/committees/en/juri/subject-files.html?id=20150128CDT00182> accessed 13 January 2016.
[14] Commission, 'A Digital Single Market Strategy for Europe' (Draft) (Communication) <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/Digital-Single-Market-Strategy.pdf> accessed 11 January 2016.
[15] Commission, 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen' (Press Release, 6 May 2015) <http://europa.eu/rapid/press-release_IP-15-4919_en.htm> accessed 13 January 2016.
[16] Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final.
[17] Commission, 'Digital Single Market' (*European Commission,* 2015) <http://ec.europa.eu/priorities/digital-single-market/> accessed 13 January 2016.
[18] Commission, 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen' (n 15).

property rights,[19] together with a Communication[20] and a proposal for a Regulation[21] on cross-border portability.

On the part of the European Parliament, then there was also development on copyright issues. In January of 2015, Pirate Party MEP Julia Reda, acting as special rapporteur for the Committee on Legal Affairs, published a draft of her report on the implementation of the InfoSoc Directive.[22] Although nominally an assessment of the impact of the InfoSoc Directive, in reality the report was a sweeping call for copyright reform, enumerating the need for greater harmonisation of the copyright term, copyright exceptions, safeguarding the public domain, implementing a TDM exception, and many other recommendations for change. After publication of the draft, it was subject to debate and amendments.[23] The final vote on this report occurred in July of 2015. Essentially, the paper's core finding was that '[t]he provisions of 2001's InfoSoc directive have not been able to keep step with the increase of cross-border cultural exchange facilitated by the Internet. The current copyright regime hinders the exchange of knowledge and culture across borders. Current challenges require a legislative update and further harmonization.'[24] However, although Reda's report made several statements about the unsuitability of current copyright legislation, by the time it had passed through all the layers of amendments, it had lost some of its edge. It was certainly not the sweeping change which may have been envisaged by the Pirate Party MEP when first drafting. In its amended form, it was accepted by the European Parliament on 9

---

[19] Commission, 'Have your say on the enforcement of intellectual property rights' (*European Commission,* 9 December 2015) <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8580> accessed 13 January 2016.
[20] Commission, 'Towards a modern, more European copyright framework' (Communication) COM (2015) 626 final.
[21] Commission, 'Ensuring the cross-border portability of online content services in the internal market' (Proposal for a Regulation) COM (2015) 627 final.
[22] Julia Reda, 'Draft Report on the implementation of Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' (2015) European Parliament Committee on Legal Affairs <https://pub.juliareda.eu/copyright_evaluation_report.pdf> accessed 18 December 2015.
[23] Amendments: Julia Reda, 'Amendments 1-280 Draft Report – On the implementation of Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' (5 March 2015) <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE549.435> accessed 13 January 2016; Julia Reda, 'Amendments 281-556 Draft Report – On the implementation of Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' (5 March 2015) <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE549.469> accessed 13 January 2016.
[24] Julia Reda, 'Reda Report Explained' (2015) (*JuliaReda)* <https://pub.juliareda.eu/copyright_evaluation_report-explained.pdf> accessed 13 January 2016.

July 2015. Although the Parliament adopted a resolution[25] that day, it was non-binding, which meant that the power for change effectively stayed with the Commission.[26]

In another analysis of the Copyright Directive, the UN Special Rapporteur in the field of cultural rights, Farida Shaheed, gave a presentation in May 2015 to the Legal Committee of the European Parliament, as part of its review process.[27] This presentation summarised the 2015 report from the Special Rapporteur, 'Copyright Policy and the Right to Science and Culture',[28] which framed tight copyright regimes as having the potential to violate the right of access to science and participation in cultural life, and urged that potential copyright instruments be carefully analysed to ensure that they do not place limitations on access to science and culture, unless pursuing a legitimate aim.[29] Reda, in comments for online news service IP Watch, was of the opinion that Shaheed's conclusions were a challenge to existing copyright law in the EU.[30] The UN Report was met with some divisive opinions, similar to Reda's report – the line between sufficient protection for content creators and owners on the one hand, and allowing sufficient access to science and culture on the other hand, is a difficult one to walk, and finding a balance between the two is, as ever, a crucial component of copyright.

A third prong of development on copyright in the EU, then, is of course that of the CJEU. While the Commission and the Parliament had been leaking and subsequently abandoning papers, publishing reports, and making promises, the Court's track record showed considerably more action. In the first half of the 2010s, a substantial number of copyright and IP judgements were issued. The jurisprudence of the CJEU was particularly active on copyright and other intellectual property rights in the period 2013-2015, with marked growth of the number of IP cases being

---

[25] European Parliament, 'Text Adopted' P8_TA-PROV (2015)0273 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0273+0+DOC+PDF+V0//EN> accessed 13 January 2016.
[26] Eleonora Rosati, 'EU Parliament rejects restrictions on freedom of panorama and ancillary right over news content' (*The IPKat*, 9 July 2015) <http://ipkitten.blogspot.co.uk/2015/07/eu-parliament-rejects-restrictions-on.html> accessed 18 December 2015.
[27] European Parliament Committee on Legal Affairs, 'Draft Agenda: Meeting Wednesday 6 May 2015' JURI (2015)0506_1 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+JURI-OJ-20150506-1+01+DOC+PDF+V0//EN> accessed 13 January 2016.
[28] Farida Shaheed, 'Report of the Special Rapporteur in the field of cultural rights: Copyright policy and the right to science and culture' (2015).
[29] ibid 20.
[30] Monika Ermert, 'EU Copyright Review Divisive; French MEP Says UN Expert Lacks Balance' (*Intellectual Property Watch,* 7 May 2015) <http://www.ip-watch.org/2015/05/07/eu-copyright-review-divisive-french-mep-calls-un-expert-too-unbalanced/> accessed 13 January 2016.

heard,[31] and a specific judge being assigned to all copyright cases.[32] However, the priorities of the CJEU and the Commission were markedly different. While the policies of the DSM strategy included tackling geoblocking, ISP controls, and exceptions and limitations (notably TDM), the CJEU's jurisprudence was more concerned with exclusive rights and a variety of exceptions and limitations. Spanning such diverse areas as private copying levies[33] and e-lending,[34] distribution rights[35] and linking,[36] the CJEU did not shy away from the technical and topical copyright issues going through national courts. While these decisions were not always well-received (*Svensson*,[37] for example, regarding linking, resulted in the European Copyright Society[38] and ALAI[39] issuing differing opinions on the matter), they showed the willingness of the European judiciary to consider the very real issues that the digital shift has thrown up with regard to copyright, and to look for solutions within the framework of the European copyright system.

From looking at the three prongs of the European Union, it is clear that there is no conception of copyright as static or unchanging, but rather a willingness to adapt and enhance the copyright framework as and when it is required. As the DSM strategy and December 2015 announcements show, copyright change is still in the air, and will likely continue to be into 2016 and beyond, but the European authorities are slow to implement sweeping reform – the amendments to the Reda Report and lack of a new Copyright Directive are indicative of this.

UK Government

From early in the mandate of the 2010-15 Conservative/Liberal Democrat government, IPRs became a hot-button issue, with Prime Minister David Cameron requesting that Professor Ian Hargreaves conduct his Digital Opportunity review in 2011.[40] In his speech announcing the review,

---

[31] 43 IP cases in the CJEU in 2013, with an increase to 69 in 2014.
[32] Marcella Favale, Martin Kretschmer and Paul LC Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' CREATe Working Paper 2015/07.
[33] *Copydan Båndkopi* (Case C-463/12), *Hewlett Packard Belgium* (Case C-572/13), *Egeda and others* (Case C-470/14), *Nokia Italia and others* (Case C-110/15).
[34] *Vereniging van Openbare Bibliotheken v Stichting Leenrecht* (Case C-174/15).
[35] *Labianca* (Case C-516/13).
[36] *C More Entertainment* (Case C-279/13), *GS Media* (Case C-160/15).
[37] *Svensson and others* (Case C-466/12).
[38] European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*' (2013) <https://sites.google.com/site/ipkatreaders/articles/ECS%20Svensson%20opinion%20final.pdf> accessed 13 January 2016.
[39] ALAI, 'Opinion Proposed to the Executive Committee and adopted at its meeting, 17 September 2014 on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public' (2014) <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf> accessed 13 January 2016.
[40] Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011).

Cameron relied on Google's founders' statements that they would not have been able to establish themselves in the UK, due to its more restrictive intellectual property laws, which provide more limited exceptions than the US's broadly formed 'fair use' provisions.[41] That review was quickly accepted by the government[42] and its recommendations, especially on copyright, were implemented, albeit after a delay of several years.[43] This was indicative that the government generally agreed with the attitude offered by Hargreaves, that the UK's IP regime was deterring economic growth, and thus needed certain amendments in order to be fit for purpose. The acceptance of the Hargreaves Review recommendations dictated the attitude of the government for the next three years, as the implementation of the exceptions came to its eventual fruition in 2014, even though one was quashed only six months later.[44] This attitude was mirrored, to a degree, in the Digital Copyright Exchange's Feasibility Study, carried out by Richard Hooper, with the aid of Dr Ros Lynch of the IPO.[45] This study concluded that copyright licensing in the UK was unwieldy and unnecessarily complicated, leading to lost revenues in scenarios where obtaining a licence was too time-consuming, or difficult.[46]

Thus, the creation of a copyright 'one-stop-shop' would avoid those complications, and increase the number of licences being lawfully obtained to make use of copyright works. It is important to note, however, that the Copyright Hub was developed in response to that need and which embodied these values required no changes to current copyright legislation, merely creating a framework which simplified the system of obtaining licences as they currently existed. It was instead a technical and infrastructural investment. The support of the government for this initiative was more than clear – from seconding Dr Lynch of the IPO, who subsequently became Copyright and Enforcement Director there,[47] to the project at its inception, to the financial

---

[41] 'The founders of Google have said they could never have started their company in Britain', David Cameron, (East End Tech City Speech, 4 November 2010) <http://webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/east-end-tech-city-speech/> accessed 19 November 2015.
[42] HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (2011).
[43] On which see Chapter 6.
[44] The private copying exception, which is discussed in Chapter 6.
[45] Richard Hooper, 'Rights and Wrongs: Is Copyright Licensing Fit For Purpose in the Digital Age?' (2012) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase1.pdf> accessed 14 December 2015.
[46] ibid 40.
[47] – –, Copyright and Enforcement Director, IPO (gov.uk) <https://www.gov.uk/government/people/ros-lynch> accessed 18 December 2015.

support offered by the government in 2013,[48] even to the continued vocal support of the Intellectual Property Office[49] through to 2015. This support can be viewed as an important indicator of the ways in which copyright and copyright industries can be encouraged to flourish and encourage growth without legislative intervention.

Given that the Hargreaves Review's conclusions focused on the simplification of copyright for economic growth, it is clear from the then-government's acceptance of those recommendations that the commitment to growth of business in the UK was important. However, that is not to say that this was a commitment to legislation where it is unnecessary. In 2015, at the start of the new Conservative government, the Intellectual Property Office published a new five-year plan, IPO 2020.[50] From this, there was a visible commitment to development of non-legislative initiatives where feasible, amply demonstrated by the vigorous support of the Copyright Hub.[51] Given the passage of several years and consultations processes between Hargreaves' suggestion of new copyright exceptions and their eventual implementation, as well as the government's extensive use of public consultations on copyright topics – there were nine consultations on copyright and designs in the 2010-2015 government period, on topics as diverse as reducing the duration of copyright in unpublished (2039) works[52] and regulation of collecting societies[53] – it is not unreasonable to say that the government was open to the idea of non-legislative initiatives, and the attitudes towards copyright were very much aimed at improving both usability and profitability of copyright materials.

Furthermore, as the conclusions to the consultation on reducing the duration of copyright in unpublished works may show, the government was further committed not to implementing unnecessary legislation or changes to copyright. Although the ERR Act 2013 created the power to

---

[48] Department for Business, Innovation and Skills, 'Government gives £150,000 funding to kick-start copyright hub' (Press Release, 25 March 2013).
[49] Ros Lynch, 'Digital disruption or simply meddling: what next for copyright and enforcement?' (PLS Open Meeting Speech, 1 July 2015). <https://www.youtube.com/watch?v=4dLw4-Hzh-A> accessed 12 November 2015.
[50] IPO, 'IPO 2020: For Discussion: The IPO five year strategy' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/414941/IPO_5_year_strategy_discussion_document.pdf> accessed 18 December 2015.
[51] ibid.
[52] IPO, 'Consultation on Reducing the Duration of Copyright in Certain Unpublished Works' (2014) <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works> accessed 13 January 2016.
[53] IPO, 'Consultation on draft secondary legislation to regulate collecting societies' (2013) <https://www.gov.uk/government/consultations/draft-secondary-legislation-to-regulate-collecting-societies> accessed 13 January 2016.

reduce the copyright duration of certain unpublished works, following the conclusion, the government elected not to utilise that power without further research, as it would have negatively affected the business model of certain rights holders.[54]

From the 2010 coalition into the 2015 Conservative majority government, then, there was a visible continuation of the same attitudes. The launching of two open consultations on copyright in July of 2015,[55] in the first three months of the new government, was a solid indication of their commitment to improving copyright in the UK. Considering then the economic importance of the creative industries, it is unsurprising that the government was committed to improving their profitability, and its system of open consultation was a step toward obtaining the views of all interested parties.

Not only was the IPO committed to a clearer and more usable copyright structure, but its five-year plan was also open for discussion and comments. Published in March of 2015, it was open to public comment for two months,[56] and the final version was publishing in January 2016.[57] This open and transparent approach to the regulation and development of IPRs, not just copyright, in the following five years, and the opportunity to contribute to the direction which the IPO would take, was an encouraging sight for all interested stakeholders. Further, the IPO's continuity was assured not only through its five year plan, but also its Ministerial oversight – appointed in 2014, Baroness Neville-Rolfe acted as (inter alia) Minister for Intellectual Property until the cessation of the coalition government, and was reappointed to the same position for the 2015 Conservative government, ensuring a degree of continuity in the governmental position toward intellectual property through the change of government.

In conclusion, although the IPO (and, in turn, the British Government) was committed to legislative change where necessary, as seen through the implementation of the Hargreaves-

---

[54] IPO, 'Government response to the consultation on reducing the duration of copyright in certain unpublished works' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399171/973_-_Governement_Response_-_copyright_in_certain_unpublished_works.pdf> accessed 18 December 2015.
[55] IPO, 'Consultation on changes to penalties for online copyright infringement' (2015) <https://www.gov.uk/government/consultations/changes-to-penalties-for-online-copyright-infringement> accessed 13 January 2016; IPO, 'Consultation on Section 72 Copyright, Designs and Patents Act 1988 (CDPA)' <https://www.gov.uk/government/consultations/section-72-copyright-designs-and-patents-act-1988-cdpa> accessed 13 January 2016.
[56] IPO, IPO 2020 (n 50).
[57] IPO, 'Making life better by supporting UK creativity and innovation: The Intellectual Property Office's Five Year Strategy' (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493893/Corporate_5_year_strategy.pdf> accessed 28 January 2016.

recommended copyright exceptions, it was also vehemently supportive of non-legislative initiatives which simplify and ease the transactional difficulties which are associated with the use of creative and copyright works in the 21st century. This balance between legislative and policy developments is difficult to keep, but the IPO's support of initiatives including the aforementioned Copyright Hub and Operation Creative (as discussed later in the chapter) showed its commitment to this balance.

Outside of the Copyright Hub, then, there were also other initiatives in place which simplify the process of licensing published works. Copyright collecting societies and professional associations moved with the times in creating initiatives which eased the licensing difficulties popping up in response to the digital shift. The Copyright Licensing Agency (CLA) developed new licensing initiatives in tandem with the British Library to supply documents along with blanket CLA licence permissions, easing the process of first obtaining documents, and then permissions to reuse them.[58] The Publishers Licensing Society (PLS) developed PLSclear,[59] an automated licensing system which allows users to seek reuse permissions beyond normal PLS licences the use of an online questionnaire which sends licensing requests to the correct rights holder. This system works in tandem with the already-mentioned PLSclear TDM engine,[60] which allows users to specifically request permission to data mine works.

On the flip side of initiatives which make it easier to obtain traditional licences for copyright material are those movements which change the culture around the sharing of information, and the way in which we license creative works. Changing the licensing structure of creative works from having to seek a specific licence from a rights holder that forbids all actions except certain specific designations to one which grants a licence to all who wish to use a creative work, with sweeping permissions attached has changed the landscape of many aspects of creative works. The sector which this section focuses on is that of scholarly publishing, as it is the most relevant, but opening up licensing is visible in many different areas, from Wikipedia, the online encyclopaedia,[61] to card game Cards Against Humanity,[62] sweeping past photo sharing sites such as Yahoo!'s

---

[58] CLA, 'Licence Plus Explained' (2015) <http://www.cla.co.uk/data/pdfs/licence_plus/licence-plus.pdf> accessed 18 December 2015.
[59] PLSclear <http://www.plsclear.com/> accessed 18 December 2015.
[60] See Chapter 6.
[61] All text on Wikipedia is available under a Creative Commons ShareAlike Licence (CC BY-SA Modified), which is specifically modified for Wikipedia alone. Wikipedia, 'Copyright' (*Wikipedia)* <https://en.wikipedia.org/wiki/Wikipedia:Copyrights> accessed 11 November 2015.
[62] Cards Against Humanity is available online for free, under a CC-BY-NC-SA 2.0 licence. See Cards Against Humanity <https://cardsagainsthumanity.com/> accessed 11 November 2015.

Flickr,[63] and even fiction publishing such as Cory Doctorow, co-editor of technology website BoingBoing.[64]

Open Access and Scholarly Publishing

The advent of digital led to an unprecedented increase in information-sharing around the world. With the ease of access to information, copyright may come to be seen as a barrier to knowledge, stopping the progress of development around the world, as the default is that rights are restricted, stopping creative works which could be so easily shared. The freedom to distribute and modify creative works and software can be difficult to achieve under current copyright frameworks, or perceived as such. The typical copyright declaration of 'all rights reserved' allows only the rights holder to modify, distribute, or display the work, and consumers can do nothing without a specific licence. This attitude, however, has been tackled by the establishment of two parallel movements which increase accessibility of information through a variety of means. The Free Software Movement[65] and Free Culture Movement[66] created new avenues for sharing and greatly increased the amount of information available online, free of charge, for reuse or adaptation, in an entirely legal and licensed way. The basic philosophy behind these movements is that creative works should be available for free reuse, through standard licensing terms which make it simple to make work available online, with permissions on re-use and adaptation embedded into standard licence clauses. The open accessibility of information will then, in theory, lead to greater development, more sharing, and more interaction. Thus, knowledge-sharing has manifold benefits, and few disadvantages.

The distinction between free software and free culture is relatively self-explanatory – the free software movement applies to software, and the free culture movement to other cultural media.

---

[63] Flickr allows users to select which licence they wish to make their work available under. These photos are then collected and are available (together with information on Creative Commons licences) on the Creative Commons page of the Flickr website: Flickr, 'Creative Commons' (*Flickr)* <https://www.flickr.com/creativecommons/> accessed 11 November 2015.

[64] Cory Doctorow is a British-Canadian blogger and science fiction author. He made his earlier books available under a CC-BY-NC-SA licence, but later changed to use a NoDerivs licence. His books are all available in a variety of ebook formats on his website, Craphound <http://craphound.com/> accessed 11 November 2015. BoingBoing.net is a technology blog first established as a zine [a self-published magazine or fanzine] in 1988 and was established as a website in 1995. BoingBoing <www.boingboing.net> accessed 16 November 2015.

[65] Richard Stallman, *Free Software, Free Society: Selected Essays of Richard M Stallman* (Free Software Foundation, Inc 2006); Margaret S Elliott and Walt Scacchi, 'Mobilization of software developers: the free software movement' (2008) 21(1) Information Technology & People 4; Peter Wayner, *Free For All – How Linux and the Free Software Movement Undercut the High Tech Titans* (Harper Business 2000).

[66] Lawrence Lessig, *Free culture: How big media uses technology and the law to lock down culture and control creativity* (Penguin 2004).

There are, inside of and related to these twin movements, many other interlocking movements and ideals, including Open Access (OA), Access to Knowledge (A2K),[67] Copyleft,[68] Open Source learning,[69] the Free Software Foundation,[70] and numerous others. There are debates about the differences between these social movements and the distinctions between *free* and *open*.[71] The movement discussed in more detail here is OA, but it is important to note the variety of other movements which are interconnected – the freedom to choose how and when and why to open up creative content is one of the fundamental strengths of copyright – the choice of how to manipulate their creative works and how to license it is left to the rights holder.

Although OA shares some commonalities with the Free Knowledge ethos, it has slightly differing ideals – rather than concentrating on the free, open and adaptable use of any information, it focuses specifically on academic and scholarly research. OA is defined as 'the practice of providing unrestricted online access to scholarly research.'[72]

---

[67] Access to Knowledge as a movement rests on the ideal that access to knowledge should be linked to basic human ideals of justice, freedom, and economic development. Lea Shaver, 'The Right to Science and Culture' (2010) 1 Wisconsin Law Review 121.

[68] Copyleft is a general method of making a program (generally, although other works are also applicable) free, and requiring that subsequent modifications and extended versions of that program to be free also. Copyleft is a generalised concept which is given effect in the GNU General Public Licence. For more, see – –, 'What is Copyleft?' (*GNU Operating System website*) <https://www.gnu.org/copyleft/> accessed 12 November 2015; – –, 'GNU General Public Licence' (*GNU Operating System website*) <https://www.gnu.org/copyleft/gpl.html> accessed 12 November 2015.

[69] David Preston, 'Open Source Learning' (TED Talk, *TEDxUCLA,* 27 October 2012) <http://tedxucla.org/2014/09/25/david-preston/> accessed 12 November 2015.

[70] The Free Software Foundation is a company which supports free software initiatives. It is a sponsor of the GNU Operating System, which in turn is the source of the Copyleft licence idea, and FSF also publishes the GNU General Public Licence, as well as other Free and Open licences – thus we can see here the interlinking nature of Free and Open movements. – –, 'About' (*Free Software Foundation*) <http://www.fsf.org/about> accessed 12 November 2015.

[71] An example of this debate can be seen in Richard Stallman, 'Why Open Source misses the point of Free Software' (*GNU Operating System website*) <http://www.gnu.org/philosophy/open-source-misses-the-point.html> accessed 13 January 2016. Richard Stallman is the founder of the GNU movement and president of the Free Software Foundation.

[72] Although there are sometimes stated to be two separate degrees of Open Access – *gratis* OA, which provides access rights [ie reading/downloading the paper] and *libre* OA, which provides additional usage rights [ie usage/distribution/modification rights], in practice, this distinction is irrelevant – for the purposes of this discussion, we will assume that we are discussing libre open access. Peter Suber, 'Gratis and libre Open Access' (*Sparc*, 2008) <http://sparcopen.org/our-work/gratis-and-libre-open-access/> accessed 18 January 2016.

Although OA was originally intended solely for academic journals, it expanded its boundaries to include also theses, book chapters, and even monographs.[73] Open Access is a philosophy, and requires a framework underneath it to support the provision of OA rights.[74]

This is achieved, for the most part, through Creative Commons licences. The Creative Commons organisation, founded by Lawrence Lessig, Hal Abelson and Eric Eldred, published a range of standard licences for use by rights holders.[75]

> [**Creative Commons licences**] provide a simple, standardized way to give the public permission to share and use your creative work — on conditions of your choice. CC licenses let you easily change your copyright terms from the default of 'all rights reserved' to 'some rights reserved.'[76]

Creative Commons licences fall into several categories, with the content owner being able to make decisions about the degree to which they would like their work to be made available. These range from the CC-0 licence, where the rights holder waives all rights to their work entirely, dedicating their work to the public domain, all the way up to CC-BY-NC-ND, which allows others to download and share work, provided that the work is credited, but prohibits any changes to the work or commercial uses. The flexibility of CC lies not only in the multiple options available to authors, but also in that the use of standard licences eliminates the need for each individual user to obtain a licence contract, and greatly reduces both the time and effort required to enable distribution and reuse of works.

CC licences offer six different options (besides the CC-0, which is a relinquishing of all rights) which combine different constituent parts to allow the rights holder to choose a licence tailored to their needs. The four specific parts are as follows:

> BY – attribution. The licensor must credit the original creator of the work.
> NC – non-commercial. The licensor must not use the work for commercial purposes.
> SA – sharealike. The licensor must licence subsequent or derivative works

---

[73] Mikael Laakso and others, 'The Development of Open Access Journal Publishing from 1993 to 2009' (2011) 6(6) PLoS ONE e20961.
[74] For an interesting and alternative explanation of Open Access, see Jorge Cham, 'What is Open Access?' (*PhD Comics*, 24 October 2010) <http://www.phdcomics.com/comics.php?f=1533> accessed 13 January 2016.
[75] Creative Commons <http://creativecommons.org> accessed 18 December 2015.
[76] – –, 'About' (*Creative Commons)* <http://creativecommons.org/about> accessed 18 December 2015.

under the same terms as the original.

ND – no derivatives. The licensor must not change or edit the work, but may redistribute it.

These terms can then be combined to create six different licences which allow for users to specify the uses they are permitting of their works; for example, a CC-BY-NC-SA licence allows non-commercial remixing, tweaking or editing of a work, provided the creator is acknowledged, and derivative works are licensed under the same terms. Thus, rights holders can use licences which give specific guidance as to what is and is not permissible, but still license their works on a large scale which does not require individual negotiation for each person who wishes to use the creative work. Creative Commons licences are used in many innovative ways. Flickr, the image-sharing site, encourages users to use CC licences for photo sharing, and has specific directories which allow other users to browse CC images;[77] Wikipedia, the online encyclopaedia, uses a Creative Commons Attribution Share-Alike Licence which allows its content to be reused freely, provided that derivative works are shared under the same licence terms;[78] sci-fi author and BoingBoing editor Cory Doctorow uses CC licences to make his work available online under a CC-Non-Commercial-Share-Alike licence (BY-NC-SA) or Non-Commercial-No-Derivatives (BY-NC-ND), and monetises his content for commercial and printed purposes.[79] The purposes for which CC licences can be used are incredibly varied, which is a part of their appeal.

Thus, in as short an explanation as possible, OA is the philosophy of allowing free access to works, and CC is (one of) the licensing framework(s) which allows that to happen.

For academic research specifically, OA is a goal which seems, at first glance, to be easily obtainable – the majority of academic authors receive no monetary compensation for their work, and thus making their work freely available online will not harm their income streams. Furthermore, as academics, they are likely to be the same people who are both publishing and consuming literature in their own field, and thus the OA movement would also have benefits for them as users.

While this may negatively affect publishers' business models – products which are also freely available online are not likely to make as much profit – and costs such as editing, typesetting and printing must still be met, a balance has been struck through the development of two different

---

[77] Flickr (n 63).
[78] Wikipedia (n 61).
[79] See, for example, Cory Doctorow, 'Download *Little Brother* for free' (*Craphound)* <http://craphound.com/littlebrother/download/> accessed 18 December 2015; Cory Doctorow, 'About *Little Brother'* <http://craphound.com/littlebrother/about/#freedownload/> accessed 18 December 2015.

models of OA. This allows publishers to sustain their business and ensure the rigorous academic standards expected of UK research are maintained. The two parallel models of OA publishing are known as Green and Gold OA.

Green OA allows authors to publish their papers and articles with journals, free of charge, and then make them publicly available after an embargo period has passed. The length of this period depends on the particular journal, but is generally three to six months, with scientific journals having shorter embargo periods as a rule. The articles may be deposited in a repository at the time of publication, but must not be made available until the embargo period has passed.[80]

Gold OA is publishing in specifically OA journals. These journals make their content available free of charge, through a variety of business models.[81] Authors may be required to pay an article processing charge (APC) to the publisher in order to publish with an OA journal.[82] There are also hybrid journals, which publish some articles OA, and some closed access. Many grant providers include funding to cover the payment of these APCs.[83] Although Gold OA is often thought of as requiring the payment of an APC, this is not necessarily the case. In 2012, Solomon and Björk found that only 26% of journals listed on the Directory of Open Access Journals (DOAJ) were self-reporting as charging APCs.[84]

Open Access (or the idea behind it) was suggested as early as 1994, in Stevan Harnad's Subversive Proposal[85] that esoteric (ie research) authors archive their papers online in an FTP archive. This developed over the intervening years, until the coining of the phrase Open Access and agreement of a definition at the Budapest Open Access Institute (BOAI) in 2002.[86] In order to achieve widespread free online access to academic research, the BOAI recommended both that authors be allowed to self-archive (also in institutional repositories) and that journals move toward becoming OA, through the launch of new journals which were OA from inception, and aiding the

---

[80] See, for example, UCL, 'Green Open Access' (*UCL Library Services*) <https://www.ucl.ac.uk/library/open-access/green> accessed 18 December 2015.
[81] See – –, 'OA journal business models' (*Open Access Directory*) <http://oad.simmons.edu/oadwiki/OA_journal_business_models> accessed 18 December 2015.
[82] David J Solomon and Bo-Christer Björk, 'A Study of Open Access Journals Using Article Processing Charges' (2012) 63(8) Journal of the American Society for Information Science and Technology 1485.
[83] ibid.
[84] ibid 1485.
[85] Stevan Harnad, 'Subversive Proposal' (*bit.listserv.vpiej-l*, 28 June 1994) <https://groups.google.com/forum/?hl=en#!topic/bit.listserv.vpiej-l/BoKENhK0_00> accessed 13 January 2016.
[86] Budapest Open Access Initiative (2002) <http://www.budapestopenaccessinitiative.org/read> accessed 13 January 2016.

transition of existing journals to OA models. The BOAI definition of OA gave a concrete form to an idea which had been around for years previously, one which remains as a standard even more than a decade after it was first stated.

> By 'open access' to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.[87]

Under this definition, not all CC licences meet the standards of Open Access. Specifically, those which place restrictions on the works, other than attribution (the CC-BY licence) fail to meet the standards outlined in the BOAI declaration.

In the UK, OA was pushed to the forefront of discussion in 2011. The Finch Report, which was aimed at improving access to published research findings, cemented OA as the gold standard for publishing.[88] The Finch Report was published by the Working Group on Expanding Access to Published Research Findings, which was set up in 2012 by the then-Minister for Universities and Science. Its mission was stated as follows:

> we were charged with recommending how to develop a model, which would be both effective and sustainable over time, for expanding access to the published findings of research.[89]

This report made several recommendations on improving access to research publications, including that UK policy support OA publishing as a policy, particularly where research is publicly

[87] ibid.
[88] Working Group on Expanding Access to Published Research Findings, 'Accessibility, sustainability, excellence: how to expand access to research publications' (2012) (Finch Report).
[89] Finch Report (n 88) 2.

funded. The Finch Report's recommendations were accepted by the UK government in July of 2012.[90]

At the same time the UK Research Council (RCUK) published its OA policy,[91] which indicated Green OA, rather than Gold, as a more cost-effective method of making research available OA. The use of embargo periods removed the need for research institutions to pay APCs, meaning that publishing OA placed less of a burden on researchers in making their research freely available.[92] The following day, the European Commission issued a Communication that recommended basing their policy concerning providing better access to scientific research on the RCUK policies. [93] These three documents (RCUK guidelines, governmental acceptance and EC Communication) were all published within two days of each other, leading to some conflicting directives on how OA should best be achieved – the Green or Gold routes. Nonetheless, all three advocated for OA as an industry standard.

In the years following these three big movements towards OA, its prominence in academia has only increased. The last Research Excellence Framework (REF) – the metric by which higher education research centres are assessed – concluded in 2014. The REF published a policy in March 2014 stating that all journal articles and conference proceedings published after April 1 2016 must be Open Access in order to be eligible for submission to the post-2014 REF.[94] Given that the REF is used to inform the funding allocation of the four higher education funding bodies,[95] the importance of research outputs being eligible for submission to the REF cannot be overstated. However, it is worth noting that the REF's requirement for OA only states that papers must be available to read and download – therefore a CC-BY-ND licence would be acceptable to meet

[90] Department for BIS, 'Government to open up publicly funded research' (Announcement, 16 July 2012) <https://www.gov.uk/government/news/government-to-open-up-publicly-funded-research> accessed 13 January 2016. The government rejected one proposal on lowering VAT rates applicable to e-journals, but this is not relevant to the topic at hand.
[91] RCUK, 'RCUK Policy on Open Access and Supporting Guidance' (2012) <http://www.rcuk.ac.uk/RCUK-prod/assets/documents/documents/RCUKOpenAccessPolicy.pdf> accessed 13 January 2016.
[92] ibid.
[93] Commission, 'Towards better access to scientific information: Boosting the benefits of public investments in research' (Communication) COM (2012) 401 final.
[94] HEFCE, 'Policy for open access in the post-2014 Research Excellence Framework' (2014) <http://www.hefce.ac.uk/media/hefce/content/pubs/2014/201407/HEFCE2014_07.pdf> accessed 13 January 2016.
[95] – –, 'About the REF' (*REF.ac.uk)* <http://www.ref.ac.uk/about/>accessed 11 June 2015.

REF standards, a less stringent requirement than that put forward by the BOAI definition of OA.[96]

The growth of OA in the first half of the 2010s was rapid – the DOAJ[97] listed more than ten and a half thousand OA journals in 2015,[98] a tenfold increase in ten years.[99] However, with the growth of OA, it has brought a new set of problems for authors to face. Shifting the financial burden from subscriptions to APCs has brought its own range of issues, including increasing costs for universities and other research-producing institutions. This was acknowledged in the Finch Report.[100] However, this assumes that all OA journals will charge APCs. In 2011, Solomon and Björk conducted a study of OA journals and found that just over 26% of those listed on the DOAJ at the time charged APCs.[101] Thus, although the Finch Report did not acknowledge that Gold OA does not always require the payment of APCs,[102] this is manifestly the case. Some three-quarters of OA journals in 2011 were using alternative methods of funding their journals. This was backed up by a further study in 2013, which set the number of journals using APCs at 28%.[103] This varied greatly depending on discipline, though, with medicine the highest users of APCs at 47%.[104] It was further found that those OA journals which charged APCs consistently had higher citation numbers than those which did not.[105] This then creates an issue for those authors who might be less well-funded, and therefore face economic barriers to the payment of APCs.[106] While there are some waiver programs in place, the effect of OA in certain scenarios is simply to shift the access problem from the reader to the author of a particular article, in cases where the author's institution

---

[96] HEFCE (n 94). Although the policy was updated in July 2015, this requirement remained unchanged. HEFCE, 'Policy for open access in the post-2014 Research Excellence Framework Updated July 2015' (2015) <http://www.hefce.ac.uk/media/HEFCE,2014/Content/Pubs/2014/201407/HEFCE2014_07_updated%20July%202015.pdf> accessed 13 January 2016.

[97] Directory of Open Access Journals <http://doaj.org/> accessed 13 January 2016.

[98] As of June 2015.

[99] Stevan Harnad and others, 'The Access/Impact Problem and the Green and Gold Roads to Open Access' (2004) 30(4) Serials Review 310.

[100] Finch Report (n 88) 73-76.

[101] Solomon and Björk, A Study of Open Access Journals Using Article Processing Charges (n 81).

[102] Finch Report (n 88) 72.

[103] Marcin Kozak and James Hartley, 'Publication Fees for Open Access Journals: Different Disciplines—Different Methods' (2013) 64(12) Journal of the American Society for Information Science and Technology 2591.

[104] ibid.

[105] Bo-Christer Björk and David Solomon, 'Open access versus subscription journals: a comparison of scientific impact' (2012) 10(73) BMC Medicine.

[106] Richard Poynder, 'The Finch Report and its implications for the developing world' (*Open and Shut?*, 18 July 2012) <http://poynder.blogspot.co.uk/2012/07/the-finch-report-and-its-implications.html> accessed 13 January 2016.

or funding is unable to cover the cost of an APC.[107] APCs can vary in both amount and format – some journals charge per page, while others charge a single article fee. They can range from $8 to $3,900[108] depending on the journal, the length of the article, and the subject area. Björk and Solomon found that by far the greatest expenditure on APCs was in the area of biomedicine, which spent over seven hundred times the amount spent by Arts and Humanities in 2010.[109]

When considering how and where to publish, academics need to take into account a number of factors. The source of funding and, from 2016, REF eligibility of the article will determine whether OA publishing is required, as well as the institution's policy. On top of this, once it has been decided that the article will be published OA, the choice between Green and Gold must be made. Where Gold OA is chosen, the selection of journal will then determine whether or not an APC must be paid. If this is the case, then the source of funding for the APC will also have to be clarified, and the amount of the APC will have to be considered, especially for those authors funding their own APCs.[110] Some funding bodies provide for APC charges in their grants, and several institutions (UCL included)[111] have central APC funds which can be used to meet the charges. As well as this, authors need to consider other factors such as journal impact,[112] number of citations, journal fit and turnaround time.[113]

There are, of course, difficulties which come with the increase in OA. Much like the great innovation of email was accompanied by the development of email spam, OA is open to abuses on several planes. The rise of so-called 'predatory publishers' running counterfeit OA journals provides a worrying new trend for authors to avoid. The system is relatively simple – these 'predatory' journals charge authors in the form of APCs, but do not provide the usual editorial and publishing services which come with traditional journal publishing, whether OA or not. They then publish low quality, non-peer reviewed, and inferior research. The issues with this are two-fold. Not only are authors required to pay APCs which far outweigh the costs of publication, but even those genuine, scientifically sound papers which are published with the counterfeit journals are

---

[107] Townsend Peterson and others, 'Open Access and the Author-Pays Problem' (2013) 1(3) Journal of Librarianship and Scholarly Communication 1.
[108] Solomon and Björk, A Study of Open Access Journals Using Article Processing Charges (n 82).
[109] ibid 1490.
[110] David J Solomon and Bo-Christer Björk, 'Publication Fees in Open Access Publishing: Sources of Funding and Factors Influencing Choice of Journal' (2012) 63(1) Journal of the American Society for Information Science and Technology 98.
[111] UCL, 'Gold Statistics' (*UCL Library Services*) <https://www.ucl.ac.uk/library/open-access/statistics> accessed 18 December 2012.
[112] Björk and Solomon, Open access versus subscription journals: a comparison of scientific impact (n 105)
[113] Solomon and Björk, A Study of Open Access Journals Using Article Processing Charges (n 82).

then tainted by the association with low-quality scholarly outputs and poor practice. Jeffrey Beall, of the University of Colorado Denver, highlighted this problem in 2012 in Nature,[114] and Learned Publishing.[115] Beall is also the curator of 'Beall's List: Potential, possible, or probable predatory scholarly open-access publishers'.[116] This list, which is updated regularly, names journals that engage, or may engage, in such predatory schemes, taking advantage of young or inexperienced authors and damaging the open ethos which is advancing scientific journalism and making it open for all in the 21st century. The criteria for inclusion in the list are available online[117] and subject to regular revision: it was updated in 2015.[118] Further, publishers may appeal their inclusion on the list, ensuring a degree of accountability, fairness, and transparency in the maintenance and curation of the list. Beall also curates a list of standalone journals (as opposed to publishers) which engage in predatory behaviour.[119]

Predatory behaviour from publishers and standalone journals is an issue especially for new, young, or inexperienced academics, especially those who may be research students or early career academics – their lack of experience in publishing academically may lead to them being more vulnerable to predatory publishing models. Universities may give guidance on this through their publishing and open access teams.[120]

In 2013, John Bohannon published an article in Science magazine, entitled 'Who's Afraid of Peer Review?',[121] a critique of Open Access journals' review and acceptance policies. It described the submission of a bogus paper to 304 OA journals, with 255 responses, and a 60% acceptance rate. This, Bohannon stated, showed that peer review as a system had lost its integrity when connected

---

[114] Jeffrey Beall, 'Predatory publishers are corrupting open access' (2012) 489 Nature 179.
[115] Jeffrey Beall, 'Predatory publishing is just one of the consequences of gold open access' (2013) 26(2) Learned Publishing 79.
[116] Jeffrey Beall, 'Beall's List: Potential, possible, or probable predatory scholarly open-access publishers' (*Scholarly Open Access*) <http://scholarlyoa.com/publishers/> accessed 18 December 2015.
[117] Jeffrey Beall, 'Criteria for Determining Predatory Open-Access Publishers (2nd edition)' (*Scholarly Open Access,* 1 December 2012) <http://scholarlyoa.com/2012/11/30/criteria-for-determining-predatory-open-access-publishers-2nd-edition/> accessed 18 December 2015.
[118] Jeffrey Beall, 'Criteria for Determining Predatory Open-Access Publishers (3rd edition)' (*Scholarly Open Access,* 1 January 2015) <https://scholarlyoa.files.wordpress.com/2015/01/criteria-2015.pdf> accessed 13 January 2016.
[119] Jeffrey Beall, 'List of Standalone Journals' (*Scholarly Open Access)* <http://scholarlyoa.com/individual-journals/> accessed 13 January 2016.
[120] See, for example, UCL, 'Open access: frequently asked questions' (*UCL Library Services)* <https://www.ucl.ac.uk/library/open-access/faqs> accessed 13 January 2016 (How can I be sure that an open access publisher is genuine/ethical/not a 'predatory publisher'?); University of Manchester, 'Advice on predatory journals and publishers' (*Open Access at Manchester)* <http://www.openaccess.manchester.ac.uk/checkjournal/predatoryjournals/> accessed 13 January 2016.
[121] John Bohannon, 'Who's Afraid of Peer Review?' (2013) 342 Science 60.

to OA journals, and the acceptance of a scientifically unsound paper to such a high proportion of journals showed the unworkability of such a system.[122]

However, there were a number of flaws with his declarations. Firstly, of course, was the fact that the hoax was conducted without scientific research basis, and thus cannot be considered more than anecdotal. Secondly, the list of journals to which the paper was submitted made no distinction between 'predatory' journals, as already discussed, and more 'respectable' OA journals. The journals to which the papers were sent were taken from Beall's list,[123] DOAJ[124] or both.[125] Taking journals from Beall's list would, naturally, lead to unsatisfactory outcomes and poor practice. The paper was only submitted to those journals which used an APC system, although in the article these are incorrectly referred to as Gold OA journals, meaning that the hoax did not engage with the full spectrum of Gold OA, and certainly not Green OA. Finally, the article was not submitted to any closed access journals, meaning that it is impossible to draw links between the article acceptance rate and the journal model, as there is nothing against which to compare it. These flaws were pointed out by several critics very shortly after publication, including PubChase,[126] the Martinez-Arias Lab,[127] scientific OA-publishing project PLoS co-founder Michael Eisen,[128] and Ian Dworkin.[129] Many of these (especially Dworkin) also linked to other commentaries on the article, with a shared conviction that the issue highlighted in the article was not OA, but rather the difficulties of peer review and the predatory OA journal model. Overall, while Bohannon's article could well have highlighted fatal flaws in OA journal models, equally it could have highlighted an issue with the peer review system – something common to both OA and closed access journal

---

[122] ibid.
[123] Beall's List (n 116).
[124] Directory of Open Access Journals (n 97).
[125] Bohannon (n 121) 61-2.
[126] Lenny Teytelman, 'What Hurts Science – rejection of good or acceptance of bad?' (*PubChase,* 4 October 2013) <http://blog.pubchase.com/what-hurts-science-rejection-of-good-or-acceptance-of-bad/> accessed 13 January 2016.
[127] Martinez-Arias Lab, 'On prepub servers and DORA, a glimpse of a future that is upon us' (*Martinez-Ariaz Lab Department of Genetics,* 7 October 2013) <http://amapress.gen.cam.ac.uk/?p=1239> accessed 13 January 2016.
[128] Michael Eisen, 'I confess, I wrote the Arsenic DNA paper to expose flaws in peer-review at subscription based journals' (*it is NOT junk*, 3 October 2013) <http://www.michaeleisen.org/blog/?p=1439> accessed 13 January 2016.
[129] Ian Dworkin, 'Fallout from John Bohannon's "Who's afraid of peer review"' (*Genes Gone Wild*, 14 October 2013) <http://genesgonewild.blogspot.co.uk/2013/10/fallout-from-john-bohannons-whos-afraid.html> accessed 13 January 2016.

publishers.[130] Alternatively, it could be interpreted as highlighting the issue of predatory OA publishers, as discussed above – this was indeed the view taken by Beall himself.[131] Thus, without a more research-oriented approach to conducting a truly scientific study of the acceptance rates of OA journals as against traditionally published journals, the merits of Bohannon's article are sadly far less than they could have been. Although the article headline stated that there was a worrying correlation between OA journals and a lack of rigorous peer review – even some of those journals which flagged the paper's potential issues at review accepted it, and some journals published even after the author withdrew[132] – the actual content of the Science article was as scientifically unsound as the bogus paper it based its investigation on, and its conclusions were incorrect in highlighting an issue with OA in general. In actuality, there have been more rigorously scientifically sound studies conducted on the retraction of articles, comparing OA and traditional publishing[133] and the scientific impact of OA journals as against subscription models,[134] both of which provided evidence as to the benefits of OA as against their subscription counterparts.[135]

Although OA does have some serious flaws – in the form of APCs creating barriers for less well-funded research institutions,[136] the proliferation of predatory publishers and journals,[137] and the increased financial burden on libraries and research institutions which are forced to both pay subscriptions to traditional publishers and APCs for OA publication – it is nonetheless a laudable and interesting subversion of the culture of publication. As well as this, it makes use of new types of copyright licensing – often, though not always, in the form of a CC licence – in order to allow greater circulation of papers without the need for individual licensing negotiations between researchers, publishers, institutions, or authors.

---

[130] Curt Rice, 'Open access publishing hoax: what Science magazine got wrong' (*The Guardian,* 4 October 2013) <http://www.theguardian.com/higher-education-network/blog/2013/oct/04/science-hoax-peer-review-open-access> accessed 13 January 2016.
[131] Jeffrey Beall, 'Science Magazine Conducts Sting Operation on OA Publishers' (*Scholarly Open Access,* 3 October 2013) <http://scholarlyoa.com/2013/10/03/science/> accessed 13 January 2013.
[132] Bohannon (n 121) 64.
[133] Gabriel M Peterson, 'Characteristics of Retracted Open Access Biomedical Literature: A Bibliographic Analysis' (2013) 64(12) Journal of the American Society for Information Science and Technology 2428.
[134] Björk and Solomon, Open access versus subscription journals: a comparison of scientific impact (n 104).
[135] Claire Redhead, 'OASPA's response to the recent article in Science entitled "Who's Afraid of Peer Review?"' (*OASPA*, 4 October 2013) <http://oaspa.org/response-to-the-recent-article-in-science/> accessed 13 January 2016.
[136] Peterson and others (n 107).
[137] Beall's List (n 115).

Advertising Initiatives for Infringing Websites

Chapters 3 and 4 discussed some of the legal and voluntary frameworks which were put in place in order to attempt to curb the growth of copyright piracy which arose in parallel with the rise of digital. The US CAS, as mentioned, is a voluntary system implemented with the cooperation of ISPs.[138] It aims, in the first two strikes, to educate consumers about the ways to avoid online piracy, and directs users to lawful content sites. This educational method is less dictatorial than other methods of enforcement. The same mindset has been employed by British authorities and copyright organisations in trying to combat piracy through the CCUK.

In the City of London, the establishment of the Police Intellectual Property Crime Unit (PIPCU) created a dedicated task force to deal with the whole spectrum of IP infringements – from counterfeit physical goods to the online and digital content infringed every year. PIPCU was established in 2013, with £2.54m of funding from the IPO.[139] Its original run of funding lasted until June 2015, but it was announced before then that more funding had been awarded to continue the unit until at least 2017.[140] It falls under the remit of the Economic Crime Directorate, and consists of 20 staff members: detectives, analysts, and researchers. It is dedicated to protecting the UK industries that produce legitimate, high quality, physical goods and online and digital content from intellectual property crime.[141]

In an innovative approach to tackling online piracy, PIPCU combined with the UK advertising industry (represented by the Internet Advertising Bureau UK, the Incorporated Society of British Advertisers and the Institute of Practitioners in Advertising) and rights holders (represented by the Federation Against Copyright Theft (FACT), the British Phonographic Industry, International Federation of the Phonographic Industry, PRS for Music, the Publishers Association and the UK Interactive Entertainment Association) to create a joint task force.[142] This

---

[138] Center for Copyright Information, 'The Copyright Alert System' (*Center for Copyright Information)* <http://www.copyrightinformation.org/the-copyright-alert-system/> accessed 18 December 2015.
[139] Josh Halliday, 'Intellectual property crime unit to be set up by City police' (*The Guardian*, 17 December 2012) <http://www.theguardian.com/technology/2012/dec/17/intellectual-property-crime-unit> accessed 18 December 2015.
[140] PIPCU, 'PIPCU funding confirmed until 2017 - Commander Head "This is fantastic news for the City of London Police"' (*City of London Police*, 18 November 2014) <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/Pages/pipcu-funding-confirmed-until-2017.aspx> accessed 13 January 2016.
[141] PIPCU, 'About PIPCU' (*City of London Police)* <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/About-PIPCU.aspx> accessed 13 January 2016.
[142] PIPCU, 'Operation Creative and IWL' (*City of London Police)* <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Operation-creative.aspx> accessed 13 January 2016.

combined task force is then responsible for 'Operation Creative', which is designed to disrupt and prevent websites from providing infringing content online. By July of 2015, more than six thousand websites had been disrupted.[143]

It works on the basis of a 'follow the money' approach – very few people will provide piracy services from pure altruism, and thus there must be opportunity for financial gain behind it. As part of Operation Creative, rights holders identify and report websites which infringe creative content. The operation then targets the money behind these infringing websites by placing them on an infringing websites list (IWL). This list is provided to the advertisers, agencies and intermediaries involved in Operation Creative, who may then voluntarily choose to withdraw their advertising from those sites.[144] This disruption of advertising revenue – which is largely what funds infringing websites (an estimated $277 million in 2013[145]) in turn seriously harms the business model of the infringer, without the need for obtaining any injunctions, blocking orders, or other legislative interventions.

The notion of an initiative which squeezes copyright pirates through financial disincentives is not new. In 2012, Google combined with PRS for Music to commission a report on the business models of copyright infringement.[146] This quantitative report provided data on a sampling of the sites thought by rights holders to be facilitating major copyright infringement, providing information on their functional methods, funding, hosting, and user bases.[147] The report identified six major business models – and for each of those segments it then identified the major economic drivers.[148] The report was clear that squeezing the finances of infringing websites was a viable method of impeding their growth and continued existence.[149] For three of the six segments,

---

[143] City Police PIPCU (@citypolicePIPCU) (Tweet, 28 July 2015) '#DidYouKnow? Since #PIPCU launched, the team has disrupted more than 6,000 illegal sites selling #fake goods! Great stat for #TechTuesday!' <https://twitter.com/citypolicepipcu/status/625999038316474368> accessed 13 January 2016.
[144] PIPCU, Operation Creative and IWL (n 142).
[145] Digital Citizens Alliance, 'Good Money Gone Bad. Digital Thieves and the Hijacking of the Online Ad Business: A Report on the Profitability of Ad-Supported Content Theft' (2014) <http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf> accessed 14 January 2016.
[146] Google, PRS for Music, 'The six business models for copyright infringement: A data-driven study of websites considered to be infringing copyright' (2012) <https://docs.google.com/file/d/0Bw8Krj_Q8UaENDhEOG1LVFRhVkU/view> accessed 14 January 2016.
[147] ibid.
[148] ibid.
[149] ibid.

advertising revenue was the significant economic driver, meaning that an initiative tackling advertising revenues on those sites was likely to have a measurable impact.[150]

This method was tested in 2013 through a three-month pilot scheme, overseen by FACT.[151] This successful pilot was then translated into a large-scale system which launched in 2014, with the backing of the already-mentioned list of creative industry figures, including CMOs, content owners, advertisers and (implicitly) the government, through its financial backing of PIPCU, via the IPO. Such a diverse collection of supporters is not only essential to the successful operation of the scheme, but also a very encouraging sign of the willingness of different players to cooperate in tackling infringing websites via methods other than simply requesting takedown of the site.

At roughly the same time in 2014, Mike Weatherley MP, IP Adviser to the Prime Minister, published his Discussion Paper '"Follow The Money": Financial Options To Assist In The Battle Against Online IP Piracy',[152] adding to the discussion of the approach as a valid method of tackling online piracy. Its publication was welcomed by PIPCU, with Commander Head commenting on his belief that the only way to make significant progress in tackling such crime was through concentrated cooperation between PIPCU and the industry.[153]

One of the most encouraging things about the 'follow the money' approach is that it is supported by organisations in such diverse positions – as Commander Head of PIPCU's comments show, cooperation between different facets of the industry is necessary to really have an impact on deterring pirates, and this is visible in all facets of Operation Creative.[154] From the report jointly commissioned by Google and a CMO to the police and rights holder cooperation required to place websites on the IWL, the widespread and enthusiastic support and embracing of effective enforcement methods without the need for judicial intervention is an encouraging sign that this could well be an extremely effective weapon in the arsenal fighting copyright infringement and

---

[150] ibid.
[151] Stuart Dredge, 'Forget suing filesharers: in 2014, anti-piracy efforts follow the money' (*The Guardian,* 2 April 2014) <http://www.theguardian.com/technology/2014/apr/02/infringing-websites-list-anti-piracy> accessed 14 January 2016.
[152] Mike Weatherly, '"Follow the Money": Financial Options To Assist In The Battle Against Online IP Piracy' (Discussion Paper) (2014) <http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf> accessed 14 January 2016.
[153] PIPCU, 'Commander Head welcomes Mike Weatherley's MP latest report on tackling advertising revenue from illegal websites' (*City of London Police*, 18 November 2014) <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/Pages/tackling-advertising-revenue-.aspx> accessed 14 January 2016.
[154] PIPCU, Funding Confirmed until 2017 (n 141).

piracy. This is equally supported by the figures which stated a 73% drop in advertising on illegal sites – what remains now is to see whether a drop in advertising is accompanied by a drop in piracy.[155]

As Minister for the Creative Industries, Ed Vaizey, stated:

> The creative industries are a real UK success story. They are now worth £71.4 billion a year to the UK economy and grew faster than all other sectors of UK industry in 2012. It is essential we protect our creative industries from people ripping off their content online. Disrupting the money unlawful websites make from advertising could make a real difference to the fight against copyright infringement. It is an excellent example of what can be achieved through industry, Government and law enforcement working together.[156]

There are, of course, issues with the IWL, as with any other system – Stuart Dredge of The Guardian pointed out that the IWL is not available to websites which may be placed on it.[157] Further, there was no publicly available appeals procedure which would allow websites to challenge their placement on the list.[158] The Pirate Party UK criticised the process, with Andrew Norton pointing out that that

> [e]xactly who verifies sites as being illegal and by which jurisdiction; how to work out if you are on this list, which will not be made public; and more importantly how to be removed from the list if inaccurately put on it is not yet clear. If the process is anything like the current censorship of pirate sites it will involve uncontested court rulings where the supposedly offending site isn't present to defend their legitimacy. [159]

Norton then went on to recommend that civil suits would be more suitable to deal with the infringements, rather than a large-scale coordinated effort.[160] He strongly criticised the

---

[155] PIPCU, 'Operation Creative sees 73 per cent drop in top UK advertising on illegal sites' (*City of London Police,* 12 August 2015) <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/Pages/Operation-Creative-sees-73-per-cent-drop-in-top-UK-advertising-on-illegal-sites.aspx> accessed 14 January 2016.
[156] Tom Pakinkis, 'Police IP Crime Unit launches Infringing Website List for advertisers' (*Music Week,* 31 March 2014) <http://www.musicweek.com/news/read/police-ip-crime-unit-launches-infringing-website-list/058069> accessed 14 December 2016.
[157] Dredge (n 151).
[158] ibid.
[159] Pirate Party UK, 'Impartiality Concerns Over London City Police' (Press Release, 31 March 2014).
[160] ibid.

government's involvement, going as far as to describe the measures as 'yet another example of the government loaning itself out to favoured groups to act as free private leg-breakers.' The effectiveness of the scheme was also called into question, with the Pirate Party representative pointing out that the reduction in advertising from household brands was only 12%.[161]

However, there are some safeguards in place. The stated standard of evidence for inclusion on the IWL is high, with content owners being required to provide a 'detailed package of evidence'[162] that a website is infringing copyright. This is then evaluated by PIPCU officers, giving an additional safeguard against websites being wrongly included on the list. Furthermore, the voluntary nature of participation in the boycott of websites on the IWL adds an extra layer of protection to those websites which may find themselves in the (unlikely) position of being wrongly included on the list. As PIPCU also confirmed to the Guardian, website owners will be contacted at the time of their first inclusion on the list, and given a chance to provide feedback and, if necessary, prove that they have changed their ways.[163]

Thus, while the transparency of the PIPCU process may be somewhat suspect, on the whole, it is a valid and encouraging action for the protection of copyright, based on a solid research backing, and a pilot scheme which did show measurable improvement, albeit perhaps not as much as might have been hoped for.[164] The awarding of additional funding to continue the PIPCU,[165] however, is indicative that the IPO, at least, is satisfied with their success in the first two years of operation.

Conclusion

In conclusion, although three very different things are discussed in this chapter, it is valid to say that they all share a common thread in that they concern oblique approaches to copyright. Given that this thesis situates itself in the study of publishing as a discipline, and not solely copyright law as related to publishing, it is important to consider both the non-legal and legal initiatives which are available and have developed over the course of the digital shift. Thus, while the development of new licensing initiatives is not directly related to the policy objectives of, say, the European Parliament, the publishing industry is directly affected by both of these things. Similarly, the reduction of traffic to pirate websites and redirection to genuine sites is vitally important. Copyright laws which work for publishers and consumers need to be combined with initiatives

[161] ibid.
[162] PIPCU, Operation Creative and IWL (n 142).
[163] Dredge (n 150).
[164] PIPCU, Operation Creative sees 73 per cent drop (n 155).
[165] PIPCU, Funding Confirmed until 2017 (n 140).

which will allow users to access the content they want and need legitimately in order to continue to support the creative industries and the publishing industries. While the European Parliament and Commission are capable of issuing Directives which will affect copyright law across the EU, there are also a variety of ways in which the EU can encourage better adaptation to digital copyright without the need for mandatory, pan-European Directives. The conducting of consultation processes[166] means that the EU is taking into account the views of citizens, while we can also see that it is exploring alternative views of copyright through the Reda report and associated processes, as well as the Licences for Europe pledges. There is a commitment to change within the Commission, as the DSM Strategy has stated, but there is certainly also a degree of restraint in considering carefully the merits of legislative change across the EU with regard to copyright. It is not opposed to approaching copyright from a different perspective – where the situation mandates it, legislation will be implemented, but there is also a willingness to find new ways to adapt to the digital shift.

Similarly, the UK government has shown a real commitment to change where necessary, through the implementation of the Hargreaves exceptions[167] and the ERR Act 2013,[168] but it is also capable of showing restraint where necessary, and not acting where it is not justified. Even after the implementation of the 2014 Hargreaves exceptions, the issue for copyright in the UK in 2015 was still making it easier for people to obtain legal access to creative works, and preventing copyright infringement, especially in an online context. The support of the government for this is clear, through the financial support offered to the PIPCU in the City of London police,[169] and the financial and personnel contributions offered to the Copyright Hub project in the last number of years.[170] Furthermore, the IPO is committed to obtaining public opinion on issues which require reform, not just ploughing on without proper consultation and research of the issues at hand. While some may feel that this is not enough – although consultations produce a variety of personal responses, the adage that 'the plural of anecdote is not data'[171] rings true here, and the IPO is committed to solid evidence for policy-making – there is still little doubt that the IPO and, in turn, the wider government, is committed to ensuring that copyright remains both profitable and accessible for creators and consumers alike in the UK in the coming years, and ensuring that

[166] Commission, 'Have your say on the enforcement of intellectual property rights' (n 19).
[167] Hargreaves (n 40).
[168] Enterprise and Regulatory Reform Act 2013.
[169] PIPCU, Funding Confirmed until 2017 (n 140).
[170] For example the secondment of Ros Lynch (n 47).
[171] Rebecca Tortell, 'The Plural of Anecdote' (*The Plural of Anecdote)* <http://www.pluralofanecdote.com/about.php> accessed 14 January 2016.

evidence submitted to consultations is of a sufficient standard.[172] The line between allowing innovation to continue and stifling creativity and profitability is a fine one. The IPO is not walking it blindly – while not all may agree with its decisions, there is no disputing that it is taking into account the views of all who respond to its consultations – one need only look to the response and results of the 2039 works consultation[173] to see this.

Outside of governmental policies, of course, there are also ways in which copyright – or navigating the copyright sphere – plays a role in the wider societal fabric. The changing attitudes of society which have accompanied the shift to digital can be seen in both positive and negative lights, framed in the context of new social movements which have created a generation of internet consumers who view copyright material in a way which is totally different to that of their forebears.

The culture of reuse, remixing, and user-generated content is one that has resulted in the need for shifts in paradigms and attitudes toward copyright and copyright works, and in certain areas, the law is struggling to catch up. However, in the arena of scientific research, users have themselves created a system which makes research more accessible to all, without the need for legislative intervention. Although the Finch Report,[174] the government's subsequent acceptance of its recommendations,[175] and the REF 2020 policy[176] have made OA essentially mandatory for UK researchers and journal publishers, the development of OA was unprompted, and it is an excellent example of an ideology which arose spontaneously and developed its own supportive infrastructure. The proliferation and adoption of OA has not always been smooth, and is faced with its own issues, including those of access to and the integrity of publishing in OA journals, as well as the financial implications of a new publishing model which shifts cost burdens to those on the publishing side, rather than the readers. Nonetheless, the development and widespread adoption of OA without the need for legislative intervention is an interesting study of the ways in which the shift to digital has resulted in something wholly unimaginable even thirty years ago.

---

[172] Both through IPO policy, which published a document laying out standards for evidence (IPO, 'Guide to Evidence for Policy' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388238/consult-2011-copyright-evidence.pdf> accessed 14 January 2016) and through the work of individuals attached to the IPO: Benjamin H Mitra-Kahn, 'Copyright, Evidence and Lobbynomics: The World After the UK's Hargreaves Review' (2011) 8(2) Review of Economic Research on Copyright Issues 65.
[173] IPO, Government response to the consultation on reducing the duration of copyright in certain unpublished works (n 54).
[174] Finch Report (n 88).
[175] Department for BIS, Government to open up publicly funded research (n 90).
[176] HEFCE, Policy for open access in the post-2014 Research Excellence Framework (n 94).

Lastly, the chapter considered a final non-legal approach to enforcing copyright. Operation Creative, although administered by PIPCU, a division of the British police force, does not threaten legal action for websites which are infringing copyright. Operation Creative is an example of a policy enforcing copyright not by going after the end-user, who is creating or downloading copies of protected works, nor through traditional litigation enforcement mechanisms, but rather works within a framework not actually related to copyright works. Rather than look for court cases litigating for the infringement of copyright works,[177] it instead strangles the financial motivations of copyright infringers by securing agreement from advertising companies, in order to reduce the financial incentives for websites which facilitate copyright infringement. This off-beat approach to protecting copyright – by cutting off the source of finances which encourage the websites to continue, as well as removing the reputable advertising which may encourage consumers to believe that they are obtaining legitimate copies of protected material – is a good example of an oblique policy which engages with the challenges of digital without the need for cumbersome legal processes. The same type of approach can be seen in the American CAS, which encourages consumers to obtain content through legal channels, without threatening drastic measures such as removing internet access, lawsuits,[178] or damages.[179]

This investigation of the policies and differing developments which have come together with the advent of digital is a snapshot of the possibilities which have followed the shift in publishing and distribution paradigms inherent in the digital revolution. Combined with the ever-developing nature of the digital revolution, this chapter has outlined some segments of the developments possible through and with the digital world. While the shift to digital has thrown up new issues for rights holders and content users alike, through issues of access, restrictive and technology-

---

[177] Although this is substantially easier now than several years ago, with the development of the small claims track of the Intellectual Property Enterprise Court: Appleyard Lees 'The Intellectual Property Enterprise Court – Quick and cost effective IP Litigation in the UK' (*Appleyardlees.com*) <http://www.appleyardlees.com/the-intellectual-property-enterprise-court-quick-and-cost-effective-ip-litigation-in-the-uk/> accessed 18 December 2015.

[178] Electronic Frontier Foundation, 'RIAA v The People: Five Years Later' (2008) <https://www.eff.org/files/eff-riaa-whitepaper.pdf> accessed 14 January 2016.

[179] *Capitol Records, Inc and others v Thomas-Rasset* No 11-2820 (8th Cir 2012); Ed Oswald, 'Is a $675,000 fine for sharing 31 pirated songs too much?' (*ExtremeTech,* 24 August 2012) <http://www.extremetech.com/internet/134992-is-a-675000-fine-for-sharing-31-pirated-songs-too-much> accessed 14 January 2016; Mike Masnick, 'District Court: $675,000 For Non-commercially Sharing 30 Songs Is Perfectly Reasonable' (*TechDirt,* 24 August 2012) <https://www.techdirt.com/articles/20120823/16473120140/district-court-675000-non-commercially-sharing-30-songs-is-perfectly-reasonable.shtml> accessed 14 January 2016; John Borland, 'RIAA settles with 12-year-old girl' (*CNet.com,* 10 September 2003) <http://www.cnet.com/uk/news/riaa-settles-with-12-year-old-girl/> accessed 14 January 2016.

specific legislation, online piracy, and other issues, the current freedom of contract and licensing which is associated with copyright also allows for interpretation and the ability to set one's own boundaries on the distribution, reproduction, and adaptation of one's work. OA is just one example of how effective copyright can be – the freedoms which are given to authors to control their works are part of what has allowed OA as a movement to flourish. This is just one example of how the Free Culture and Free Software movements have shifted boundaries and created new paradigms. The shift to digital was monumental, and created multiple issues for legislators, content creators, publishers, and users alike. This chapter, however, has shown a small sampling of how policies have embraced digital and utilised its unique properties to create new paradigms and benefit from flexible approaches to copyright and copyright works. The need for legislation is not always clear, and this chapter has shown just some of the ways which the current copyright framework is fit for purpose in that it offers the flexibility and freedom of contract and licensing to create infrastructures and systems which allow creativity to grow.

Conclusion

This thesis has conducted an analysis of how copyright adapted to the digital shift, and considered whether it is fit for purpose in the face of the changes wrought by the shift to digital on the copyright framework, finally concluding that it is indeed generally fit for purpose in the digital age.

This analysis looked at copyright from a number of different perspectives. It considered firstly the Anglophonic grey literature which called for copyright reform in the UK, Ireland, the EU, Australia, and the US, and the different degrees of reform which were suggested. It pointed out the almost universal declaration that there was difficulty licensing copyright material,[1] especially with regard to small, individualised licensing agreements, and the difficulty of copyright use for innovative, small new businesses. Visible in both the British Hargreaves Review[2] and the Irish report Modernising Copyright,[3] innovation is a vital part of the modern economy, and essential to helping with economic recovery in the wake of the global crash. Thus, the reports advocated for both legislative improvement of exceptions to copyright and an improved licensing framework via the use of a digital copyright exchange (DCE).[4] From the literature review, the dissertation acknowledged that there was a prevailing negative attitude visible in the grey literature with regard to how copyright adapted to digital. Thus, from this position, the thesis question was formed – is copyright fit for purpose for the digital age? Or had copyright, as an institution which developed first over three hundred years ago, been outpaced by technological innovation, and thus was it no longer adequate to serve the needs of the millions of content creators and consumers who relied on copyright to govern their everyday transactions and lives? In 2013-15, was copyright in need of overhaul? Was the copyright regime failing to support creative and profitable businesses in the way it had done in the past?

In order to consider this question fully, of course, a consideration of the historical development of copyright was essential. An understanding of how copyright operated in the 21st century must be preceded by an understanding of how it had reached that point, from its beginnings as, essentially, a monopoly for the Stationers Company to control printing in the 18th century.[5] Thus,

---

[1] See, for example, the UK and Irish reviews, which both suggested establishing a Digital Copyright Exchange. Ian Hargreaves, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011); Copyright Review Committee, 'Modernising Copyright: The Report of the Copyright Review Committee' (2013).
[2] Hargreaves (n 1).
[3] Copyright Review Committee (n 1).
[4] In the UK, this has been partially implemented in the form of the Copyright Hub. Copyright Hub <http://www.copyrighthub.co.uk/> accessed 19 December 2015.
[5] Copyright Act 1709 (8 Ann c 21 or 8 Ann c 19) (Statute of Anne).

the thesis considered the historical development of copyright, from the pre-legislative judgements regarding the permissibility of copying books,[6] through the monopoly of printing,[7] to the first example of statutory copyright in the form of the Statute of Anne.[8] Naturally, that original copyright monopoly is almost unrecognisable in the current framework of international treaties, Conventions, Directives, and other legislative developments which have formed copyright as it stood in 2015. Nonetheless, the same idea of copyright which is framed in the United States Constitution can be relied upon even now in the 21st century as a succinct and still relevant declaration of the original purpose of American copyright which, of course, was essentially imported directly from English copyright.

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.[9]

This copyright clause is an interesting one to consider, as it frames the debate about copyright succinctly – is the aim of copyright to promote science and useful arts (as is the focus in the US), or is it to allow creative people to make a living from their works (as emphasised in Europe)? Should copyright aim to promote financial and economic growth, or should it aim to make the sciences and the arts available to all? The answer, as with most questions, is not simply black or white, but rather a balancing act in which copyright plays a mediator role between ensuring adequate access to scientific and artistic works, while also ensuring that those who create them are motivated to do so through the provision of adequate remuneration and recognition for their works.[10] This balance has come up time and time again throughout the thesis, and is the tightrope which copyright walks with every implementation and development of the copyright framework. Additionally, with the development of international standards of copyright, the UK agreed to adhere to international obligations from a number of sources, including the Berne Convention,[11]

---

[6] HJ Lawlor, ECR Armstrong and WM Lindsay, 'The Cathach of St Columba' (1916/17) 33 Proceedings of the Royal Irish Academy. Section C: Archaeology, Celtic Studies, History, Linguistics, Literature 241.
[7] Robert C Hauhart, 'The Origin and Development of the British and American Patent and Copyright Laws' (1983) 5 Whittier L Rev 539.
[8] Statute of Anne (n 5).
[9] United States Constitution, Art 1, s 8, cl 8.
[10] Abraham Drassinower, 'From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law' (2008) 34 Journal of Corporation Law 991.
[11] Berne Convention for the Protection of Literary and Artistic Works (as amended).

the WIPO Copyright Treaty,[12] and a variety of European Copyright Directives.[13] Thus, the actual probability of a wholesale reform of copyright for the UK is quite small – unless it wished to engage in the lengthy process of detaching itself from the variety of international agreements to which it is now a signatory party.[14] Thus, copyright reform must come from within certain strictly defined boundaries, and it is also is likely that it must happen in agreement with other related territories – for example, European copyright reform would be equally applicable to all 28 EU Member States. Of course, this is not always mandatory – as can be seen with the InfoSoc exceptions,[15] not all countries elected to implement the exceptions at first instance. Indeed, the UK elected not to apply the exceptions until 13 years after the Directive came into force, only doing so in 2014.

After considering the historical development of copyright through its three hundred year history, the thesis then moved on to consider some of the methods which have been used to improve copyright enforcement, especially with regard to consumer piracy, in response to the shift to digital. It considered firstly graduated response systems, from the first system in France (Hadopi),[16] through to the voluntary system envisaged in the UK in 2015,[17] although still awaiting implementation at the end of the research period. It took into account the difference between legislative and voluntary systems, and considered also the punitive systems which gradually developed into more educational systems, as evidenced by the American voluntary CAS.[18]

Although relatively little information is available on the number of final sanctions which were issued by punitive GR systems such as Hadopi and the New Zealand copyright tribunal,[19] the chapter does look at the removal of powers from the Hadopi agency as a poor sign for the effectiveness of the system. It considers also the very small number of successful prosecutions which were issued by the New Zealand copyright tribunal in 2014 and concludes that in terms of pure monetary deterrence, the GR systems discussed in the chapter do very little in terms of providing financial compensation for copyright piracy. However, what becomes clear over the

---

[12] WIPO Copyright Treaty 1996.
[13] Most frequently mentioned throughout the thesis was the 2001 InfoSoc Directive, but it is by no means the only Directive which applies. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 (InfoSoc Directive).
[14] With the 'Brexit' referendum result and the UK's ensuing detachment from the European Union, this could well be the ideal time for considering drastic copyright reform.
[15] InfoSoc Directive (n 13) Art 3.
[16] See Chapter 3: A Legal Investigation of Copyright: Graduated Response, France.
[17] See Chapter 3: A Legal Investigation of Copyright: Graduated Response, United Kingdom.
[18] See Chapter 3: A Legal Investigation of Copyright: Graduated Response, United States.
[19] See Chapter 3: A Legal Investigation of Copyright: Graduated Response, New Zealand.

course of the chapter is that the educational aspect of GR systems is one which gained more traction through the development of different international systems. Thus, in the newer systems such as the voluntary American CAS and CCUK, there is not a focus on punitive measures such as fines or cutting off internet access for persistent offenders, but instead a more educational approach, which focuses on redirecting consumers to legitimate avenues of content consumption.[20] As can be seen from the numbers of subscribers to streaming services – with Netflix boasting 62 million members in mid-2015,[21] and Spotify 60 million at the end of 2014[22] – consumers are willing to pay for content. Every subscriber to Netflix is required to pay, and while Spotify operates on a dual-layer subscription basis, a quarter of its subscribers are paid, showing that there is still a substantial user base there and willing to pay for content. It is simply that the shift in paradigm has resulted in a shift in consumer attitudes also, and thus content providers need to adapt to this.

The second of two closely related chapters, Chapter 4 also looked at copyright enforcement methods which arose online, but not those that focus on the end-user. Rather, it looked at the notice and takedown systems which were implemented in the Digital Millennium Copyright Act in the US in 1998,[23] and the E-Commerce Directive[24] in Europe. These systems allow content owners to send notices to OSPs, requesting that they take down infringing content from their sites. It can be implemented using an automated system in both jurisdictions, which has led to some abuses,[25] but is also an efficient and effective way of issuing notices to request the removal of illegitimate content.

The onus of monitoring being on the right holder in order to request removal of their content has meant that several systems have been developed which take care of the monitoring for rights holders. Thus, private businesses such as MarkMonitor[26] have developed monitoring systems

---

[20] See generally, Chapter 3: A Legal Investigation of Copyright: Graduated Response.
[21] Netflix, 'Netflix to Announce Second-Quarter 2015 Financial Results', (Press Release, 12 June 2015).
[22] Stuart Dredge, 'Spotify financial results show struggle to make streaming music viable' (*The Guardian,* 11 May 2015) <http://www.theguardian.com/technology/2015/may/11/spotify-financial-results-streaming-music-profitable> accessed 16 October 2015.
[23] Digital Millennium Copyright Act 1998, Pub L 105-304, 112 Stat 2860 (US).
[24] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.
[25] Michael Piatek, Tadayoshi Kohno and Arvind Krishnamurthy, 'Challenges and Directions for Monitoring P2P File Sharing Networks - or - Why My Printer Received a DMCA Takedown Notice' (HotSec Conference, San Jose, 29 July 2008) <http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf> accessed 23 September 2015.
[26] MarkMonitor <https://www.markmonitor.com/> accessed 19 December 2015.

which seek out illegitimately hosted versions of copyright content and send notices on behalf of rights holders. Although there are many examples of these private companies which monitor on behalf of content owners, it is difficult to gain access to them, due to their private commercial nature. The Publishers Association (PA), a trade organisation which represents book, magazine and journal publishers in the UK, developed a similar monitoring system, known as the Copyright Infringement Portal,[27] to which the author was able to gain access. Thus, from this, it can be seen that the work involved in monitoring and sending take down notices is greatly reduced by virtue of the shared system which is provided by the PA. This, and other private commercial systems allow rights holders to take advantage of the notice and takedown systems in place in both Europe and the US, and achieve the speedy removal of their content from illegitimate websites as well as search engine results, such as on Google.

The added benefit of monitoring systems such as the PA Copyright Infringement Portal is that they can then inform further actions against those online service providers which do not comply with notice and takedown requests. The second half of Chapter 4 discussed those actions, which take the form of blocking injunctions. It considers the development of blocking injunctions in several different jurisdictions, considering firstly the UK. Blocking injunctions require ISPs to block access to specific sites[28] and were first used in the UK in *Newzbinz*.[29] The chapter then analysed the implementation of an almost identical provision in the Irish copyright system,[30] which occurred following a judgement[31] which noted a lacuna in the law, in contravention of the European Directive[32] which created the power. Such injunctions have not always been well-received, however, as the attempt to implement a similar system in the US showed – the global anti-SOPA protests[33] in response to the suggested US legislation were an indication of the general opposition to the possibility of blocking injunctions. However, SOPA was much more widely-drawn than the UK and Irish equivalent measures. Finally, the turnaround in terms of blocking injunctions, and indeed ISP liability, in Australia was discussed. In 2012, Australian jurisprudence was somewhat different to the norm in that it declined to find liability for ISPs for infringing

---

[27] Copyright Infringement Portal <http://copyrightinfringementportal.com> accessed 19 December 2015.
[28] Copyright, Designs and Patents Act 1988 s 97A.
[29] *Twentieth Century Fox and others v British Telecommunications PLC* [2011] EWHC 1981 (Ch).
[30] Copyright and Related Rights Act 2000 (As Amended) s 40(5A) (Ireland).
[31] *EMI Records (Ireland) Ltd and others v UPC Communications Ireland Ltd* [2010] IEHC 377.
[32] InfoSoc Directive (n 13) Art 8(3).
[33] Jenna Wortham, 'Public Outcry over Antipiracy Bills Began as Grass-Roots Grumbling' (*The New York Times,* 19 January 2012) <http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?pagewanted=1&ref=technology&_r=0> accessed 10 August 2015.

actions on their networks.[34] However, only three short years later, a provision which allowed for blocking injunctions was implemented into Australian law, a complete 180° turnaround.[35] The use of blocking injunctions has been roundly accepted by UK copyright organisations, with over a hundred sites blocked in the first few years of use.[36] Although book and publishing organisations were slow to take up this weapon in the arsenal against copyright theft, it was not long until they did so, with their first injunction being granted in a case taken by the PA in 2015.[37] Blocking injunctions may not be the golden gun that they first appear to be – indeed, they have many weaknesses, and can generally be circumvented with relative ease[38] – but they are an important tool which may act as a further deterrent to the casual pirate. Combined with the educational aspects of newer copyright promotion and protection systems, they could prove to be an important factor in pointing consumers toward legitimate content consumption.

The thesis then moved on to consider the real economic contribution of the copyright industries to the UK economy. The dissertation conducted an analysis of the economic contribution of the core copyright industries in 2010-2012. It did this by using the WIPO framework which was published in 2003.[39] This framework allows a study conducted following these guidelines to then be compared with other WIPO countries,[40] making for easy conclusions to be drawn about the relative size of the core copyright industries of the UK. Of course, this system is not fool-proof, nor is it used by all WIPO countries. Thus, it is important to remember that the results obtained from the WIPO Guidelines are inexact, and comparison with other WIPO-compliant reports is incomplete, as it takes into account only those countries which have produced their own reports.

For this reason, the second half of the chapter considered some of the other research which was conducted on the topic of the economic status of the copyright industries. It collected together a

---

[34] *Roadshow Films Pty Ltd and others v iiNet Ltd* [2012] HCA 16.
[35] Copyright Act 1968 s 115A (Australia).
[36] Darren Meale, '500 and Counting: websites blocked by order of UK courts' (*The IPKat,* 29 July 2015) <http://ipkitten.blogspot.co.uk/2015/07/500-and-counting-websites-blocked-by.html> accessed 19 December 2015.
[37] Publishers Association, 'Publishers Win High Court Support in Fight Against Infringement' (Press Release, 26 May 2015).
[38] Ofcom, '"Site Blocking" to reduce online copyright infringement' (2010) <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> accessed 19 December 2015.
[39] WIPO, 'Guide on Surveying the Economic Contribution of the Copyright Industries' (2003).
[40] WIPO, 'WIPO Studies on the Economic Contribution of the Copyright Industries' (2014) <http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf> accessed 17 December 2015.

variety of research conducted by and on behalf of government bodies,[41] as well as private research, and specific research which split the copyright industries by content type.[42] From an analysis of this collected research, together with the WIPO-compliant study conducted in the first half of the chapter, a conclusion can be drawn that the copyright industries are still immensely profitable, not just for the UK, but also globally. Although some industries have struggled to adapt to the shift to digital,[43] and indeed large legacy publishers have struggled especially,[44] given time, they are finding new ways to shape their businesses to take advantage of digital publishing and business models, and are finding new ways to thrive. As well as this, nimble new digital-only start-ups are finding ways to take advantage of their lack of cumbersome legacy business, and adapting to the digital age with remarkable innovation.[45] Thus, although copyright may cause some difficulties, especially with regard to the simplification of licensing, it is not throttling the creative industries, nor are they dying the death which is sometimes portrayed by reports such as the Hargreaves Review.[46] In fact, according to the WIPO-compliant study conducted in the first half of this chapter, the core copyright industries were growing and contributing more to the UK economy each year. This fact is reflected also by the IPO's Creative Industries Economic Estimates.[47] Thus, it is important to note when considering change to copyright, that the copyright framework as it stood was helping to contribute billions of pounds to the UK GDP each year,[48] and trillions globally.[49] Thus, it is important to consider the impact that changes to copyright legislation or administration would have on this part of the UK economy – at the third largest employment sector in the EU,[50] it would be foolish to plough ahead and make changes which benefit the

---

[41] EPO, OHIM, 'Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union, Industry-Level Analysis Report' (2013) <http://www.ipo.gov.tt/uploads/documents/Intellectual_property_rights_intensive_industries_contribution_to_the_economic_performance_and_employment_in_the%20European_Union.pdf> accessed 11 January 2016.

[42] Andra Leurdijk and others, 'Statistical, ecosystems and competitiveness analysis of the media and content industries' (2012); Jean Paul Simon and Giuditta de Prato, 'Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Book Publishing Industry' (2012).

[43] Notably the newspaper industries: Leurdijk and others (n 42).

[44] ibid.

[45] ibid.

[46] Hargreaves Review (n 1).

[47] Department for Culture, Media and Sport, 'Creative Industries Economic Estimates January 2014 Statistical Release' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271008/Creative_Industries_Economic_Estimates_-_January_2014.pdf> accessed 8 January 2016.

[48] ibid.

[49] EPO, OHIM (n 41).

[50] Ernst and Young, 'Creating Growth: Measuring cultural and creative markets in the EU' (2014) <http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/$FILE/Creating-Growth.pdf> accessed 30 November 2015, 10.

consumer without taking into account the immense contribution of the creative industries to the UK economy, and the livelihoods of the millions of people employed in the creative economy. Once again, it is clear that copyright is a delicate balancing act between the interests of all related parties, and any change should be very carefully considered.

The thesis then continued to consider the implications of the implementation of two of the Hargreaves exceptions – specifically the private copying[51] and TDM exceptions.[52] It looked firstly at their process for recommendation, in terms of submissions to the Hargreaves Review[53] and the logical need for them as an exception, before looking at the rationale for implementing a copyright exception, as described in the Green Book[54] – that is to say, that an exception should be implemented in the case of a complete market failure. Although this is arguably the case in terms of private copying, the chapter goes on to show that this is most definitely not the case with regard to TDM. The implementation of the TDM exception was relatively straightforward, but the same cannot be said for the private copying exception, which was quashed by judicial review[55] in the year following its implementation. Chapter 6 also considered the wider call for a TDM exception which was visible at a European level,[56] but uses the British example of the quashing of the private copying exception and the relative non-use of the TDM exception to caution against hasty implementation of a mandatory pan-European TDM exception. This case study of two Hargreaves exceptions can serve as an example for the wider copyright framework, in which it can be seen that in certain cases industry can find its own solution, given sufficient time. This is visible in the example of TDM, where PLS-surveyed publishers, on the whole, reported that they were not receiving TDM requests, due to the success of industry-supported initiatives such as PLSclear's TDM engine and CrossRef.[57] In cases where an exception is supported, the private copying exception serves as an

---

[51] Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 SI 2014/2361.
[52] Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014 SI 2014/1372
[53] Hargreaves Review (n 1).
[54] HM Treasury, The Green Book: Appraisal and Evaluation in Central Government (2011).
[55] *BASCA v SofS (BIS)*[2015] EWHC 2041 (Admin).
[56] The Expert Group, 'Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining' (2014); Jean-Paul Traille, Jérôme de Meeûs d'Argenteuil and Amélie de Francquen, 'Study on the legal framework of text and data mining (TDM)' (2014) <http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf> accessed 12 January 2016; Julian Boulanger and others, 'Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU: Analysis of specific policy options' (2014) <http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf> accessed 12 January 2016.
[57] Publishers Licensing Society, 'Survey shows text and data mining supported by licensing not copyright exceptions' (*PLS News and Events*, August 2015) <http://www.pls.org.uk/news-events/n-tdm-august-15/> accessed 18 October 2015.

example of the vital importance of sufficient impact assessment – the quashing of an exception less than twelve months after its implementation is the opposite of what legislators would have hoped for. The combination of the close study of these two exceptions allows for a clear picture of what should be considered when implementing new exceptions to copyright which account for difficulties which may arise with the shift to digital – while exceptions may sometimes be necessary, they should be carefully and tightly drafted, and should also take into account the potential consequences for both rights holders and consumers of creative content. Thus, once more, it is clear that copyright is a balancing act between the interests of all related parties. The Hargreaves exceptions show, however, that rushing into poorly thought-out exceptions is never a good idea, and may result in superfluous or indeed unworkable exceptions.

The final approach which the research takes with regard to the analysis of copyright is to take a closer look at not only the attitude of UK and European government toward copyright reform in the future, but also some of the initiatives which have arisen, given sufficient time, through the cooperation of industry, enforcement, rights holders, and indeed content users. After an analysis of the attitude of governments toward copyright,[58] the chapter moved on to discuss some of the initiatives that are simplifying and improving copyright, while staying within the (admittedly lenient) bounds of the current copyright framework. OA,[59] and related open knowledge movements, is one such example – the opening up of academic research is something which has been made possible through the shift to digital, and the cooperation of researchers, funders, and publishers alike. While it has certainly had its own issues, not least with predatory publishers and accusations of lowered standards of academic research,[60] the unprecedented and unparalleled accessibility of scientific and academic research has been made possible through the cooperation of the relevant parties, supported by government, through its endorsement of the Finch Report.[61]

Also of interest in this chapter is the UK Copyright Hub,[62] a work in progress aiming to become a DCE which will simplify the process of small, single-use licensing which makes up the long tail of copyright transactions. Although this initiative is government-supported, and a certain amount of funding has been provided by the IPO, it is a private enterprise, supported by industry bodies, and is an example of cooperation of copyright industries on an unparalleled scale. The fact that

---

[58] See Chapter 7: Alternative Approaches To Copyright, Governmental Attitude to Copyright.
[59] See Chapter 7: Alternative Approaches To Copyright: Open Access and Scholarly Publishing.
[60] John Bohannon, 'Who's Afraid of Peer Review?' (2013) 342 Science 60.
[61] Working Group on Expanding Access to Published Research Findings, 'Accessibility, sustainability, excellence: how to expand access to research publications' (2012).
[62] The Copyright Hub (n 4).

the Copyright Hub exists at all is an example of the incredible results that are possible through the cooperation of industry and government – to suggest to anyone twenty years ago that it might be possible to go to a single place to obtain the correct licensing information, and also obtain a licence would have been a notion far outside the bounds of possibility. And yet, with the development and cooperation which has become a reality in the 21st century, the Copyright Hub is well on its way to being a fully-functional DCE. The recommendation of such an initiative is not unique to the UK, either – the Irish report Modernising Copyright[63] lauded the idea, suggesting that an Irish DCE would be a similarly advantageous creation.

Another example of industry and establishment cooperation is the UK initiative Operation Creative, which aims to combat copyright infringement through squeezing the companies which profit from copyright infringement, rather than the end consumer. This 'follow the money' approach has been suggested by multiple stakeholders as being the most effective way of combatting copyright infringement – after the removal of power from Hadopi, the French government stated that it would be shifting its focus to those who benefit commercially from piracy,[64] rather than the individual downloader or teenager in his or her bedroom. The cooperation of the City of London police, advertising bodies, and copyright industries allows for an initiative which is tackling copyright infringers by hitting the link in the chain which will suffer the most – if there is no financial incentive in copyright infringement, then it is less likely that businesses will be able to support the large-scale websites which enable downloading. This cooperative approach which targets the most vulnerable part of the supply chain is an important shift in the dynamics of copyright protection. Combined with the educational advocacy discussed earlier in Chapter 3, it paints a new picture of copyright enforcement: one which aims not to scare off the consumer by threatening them with removal of their internet or fines, but instead educates them about the effects of copyright piracy, the vital role that copyright plays in providing creative content, and targets instead the companies which are profiting from the infringement of copyright.

Throughout the thesis as a whole, a number of ideas become clear – first, that the draconian enforcement of copyright as an absolute, while it may be the ideal for rights holders, is not a feasible reality in the digital age – scales of the internet, the ease of sharing content, and the

---

[63] Copyright Review Committee (n 1).
[64] Ministry for Culture and Communication, 'Publication du décret supprimant la peine complémentaire de la suspension d'accès à Internet' (Press Release, 9 July 2013) (French) <http://www.culturecommunication.gouv.fr/Presse/Communiques-de-presse/Publication-du-decret-supprimant-la-peine-complementaire-de-la-suspension-d-acces-a-Internet> accessed 19 December 2015.

number of alternatives for obtaining illegitimate content make the rigid enforcement of copyright a losing battle, even if it is one on which content holders may wish to make their name.

Similarly, the wholesale opening up of copyright, removal of copyright, or indeed the implementation of excessive numbers of exceptions to copyright is in no way feasible, not only because of the numerous international agreements which govern UK copyright, but also because of the delicate balancing act which exists in terms of allowing content creators to protect their interests and motivate them to keep creating, while also ensuring that scientific and artistic endeavours are given sufficient exposure and distribution, and consumers are able to access the creative works. Because of the symbiotic nature of creative content – creators cannot be remunerated if nobody is consuming their works, but consumers cannot pay if works are inaccessible, or wrongly priced – copyright reform is forced also to walk that knife-edge of finding the balance which allows all those involved in copyright to flourish.

Future Research

Any doctoral thesis can cover only a select portion of a topic, given the restrictions of a single doctoral researcher. However, in the course of this research project, many aspects of copyright research have arisen which would merit further study, and would contribute greatly to the academic knowledge around copyright and the content industries in the future. It would not be possible to list all of the permutations of research which could arise from this project, so this concluding chapter will mention only a few of the most relevant.

Firstly, it would be worth noting that similar analyses of copyright could be conducted with a focus on differing content types. Music is frequently the topic of copyright publications, as can be seen through the evidence base referenced throughout this thesis. However, it would be interesting to replicate the music-related research for other content types, such as film and television, software, and videogames. It is important to note the essential differences between content types, and how the shift to digital and digital developments have affected those creative industries. The IPO's online Copyright Infringement Tracker,[65] for example, shows that while content consumption online was high for music (35%) and TV programmes (34%), it was significantly lower for books, computer software, and video games, which each were at 12%. The difference of almost three times more consumption of music would explain the bias of research towards the music and TV industries, naturally, but it is crucial to study the differences in how different industries have

[65] Kantar Media Monitoring, 'OCI Tracker Benchmark Study 'Deep Dive' Analysis Report' (2013) <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/deep-dive.pdf> accessed 25 November 2015.

reacted to and are affected by the digital shift, and how changes to copyright law are likely to affect each industry separately.

In keeping with the theme of a fuller understanding of different types of copyright industry, a full WIPO-compliant study which offered an estimation of the whole of the copyright industries, rather than just the core copyright industries as offered in this thesis, would be a valuable direction to take copyright research. A robust and economically sound study which allows for comparison with those other countries which are conforming to the same guidelines would be an important factor in assessing the position of the UK with regard to its copyright industries. While one may assert that the UK is a world leader in terms of publishing and music industries, and has great advantages due to the high export value of English-language goods, it is essential that these assertions can be backed up by robust, economically sound, independently verifiable research, and thus a full WIPO-compliant study would be the ideal medium to base these assertions upon. However, this should be conducted in accordance with the revised WIPO guidelines which were released in 2015,[66] in order to ensure maximum accuracy.

Blocking injunctions are considered in Chapter 4, but there is more research which could be conducted in this area – while prevention measures are mentioned in Article 8(3) InfoSoc,[67] there is no specificity as to what form the measures must take. 2015 was a year of great activity with regard to blocking injunctions, with measures being discussed in many European countries. In November 2015, the German Bundesgerichthof granted a request for a blocking order from German collecting society GEMA against ISP Deutsche Telekom,[68] but in the same week, the Stockholm District Court denied a similar order against ISP B2.[69] The question of blocking injunctions will continue to be an interesting one into and beyond 2016.

---

[66] WIPO, 'Guide on Surveying the Economic Contribution of the Copyright Industries: 2015 Revised Edition' (2015).
[67] InfoSoc Directive (n 13) Art 8(3).
[68] Mark Schweizer, 'BGH on blocking injunctions: first go after the source' (*The IPKat,* 30 November 2015) <http://ipkitten.blogspot.co.uk/2015/11/bgh-on-blocking-injunctions-first-go.html> accessed 1 December 2015.
[69] Eleonora Rosati, 'Blocking orders across Europe: personality disorder or are the Swedes right?' (*The IPKat,* 1 December 2015) <http://ipkitten.blogspot.co.uk/2015/12/blocking-orders-across-europe.html> accessed 1 December 2015.

As mentioned in Chapter 7, copyright reform is one of the pillars of the Digital Single Market strategy, and with a consultation,[70] a proposal for a draft Regulation,[71] and a Communication[72] on copyright all published in December of 2015, there is no doubt that there will be much movement in the European copyright sphere into 2016 and beyond. Adequate consideration of these developments is a vital area for future research.

Other areas of international copyright development which would merit further research and investigation would be international treaties and agreements which make changes to copyright functionality as part of the agreement. The Trans-Pacific Partnership (TPP),[73] an international agreement between twelve countries, including the USA, Canada and Japan, concluded negotiations in November 2015, and contains many important provisions for copyright and digital policy. Examples of these include the extension of both Canadian and New Zealand copyright terms and the agreement not to implement the Canadian-style notice and notice system in other TPP countries[74]. Although the UK is not party to the TPP, and neither is Europe, it is an important agreement to study by virtue of its negotiators. Another, similar, agreement which has yet to be made publicly available is the Transatlantic Trade and Investment Partnership (TTIP), a proposed Free Trade agreement between the United States and the European Union.[75] The agreement is expected to conclude in 2016, and includes a chapter specifically on intellectual property rights. Such an agreement would have to find a resolution to issues which differ between US and European copyright rules, including public performance and broadcasting rights – for example, radio performances in Europe accrue financial compensation for the performer, whereas in the US compensation only accrues to the composer. Although the negotiations of the TTIP have been mostly in secret, some details have been released, including some negotiating documents

---

[70] Commission, 'Have your say on the enforcement of intellectual property rights' (*European Commission,* 9 December 2015) <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8580> accessed 13 January 2016.
[71] Commission, 'Ensuring the cross-border portability of online content services in the internal market' (Proposal for a Regulation) COM (2015) 627 final.
[72] Commission, 'Towards a modern, more European copyright framework' (Communication) COM (2015) 626 final.
[73] Office of the US Trade Representative, 'The Trans-Pacific Partnership' <https://ustr.gov/tpp/> accessed 19 December 2015.
[74] Michael Geist, 'Why the TPP is a Canadian Digital Policy Failure' (*MichaelGeist.ca*, 18 November 2015) <http://www.michaelgeist.ca/2015/11/why-the-tpp-is-a-canadian-digital-policy-failure/> accessed 23 November 2015.
[75] Commission, 'In Focus: The Trans-Atlantic Trade Investment Partnership' (*European Commission: Trade*) <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 19 December 2015.

and short summaries of each chapter.[76] The TTIP will have many effects on trade between the US and the EU, and thus is worthy of study, but a specific study of the impacts on copyright and intellectual property rights would be an important step in the progression of understanding of copyright and how it operates internationally.

Returning to the UK alone, there are many areas of research which have been briefly touched upon in the thesis which would be hugely interesting and beneficial to consider. The Copyright Hub is still in its infancy, and as it promises to be a game-changer in terms of simplifying licensing, it will be an area ripe with potential research projects, on the impact of the Hub, the number of licences obtained through the Hub, the increase or decrease in infringing content with the advent of easier licensing, to name but a few. Further research on the Copyright Hub would also be beneficial for other countries which may follow suit in implementing a DCE, as it would be a basis upon which new DCEs could be developed, in order to improve the future offerings to simplify digital licensing.

The impact of the UK Hargreaves Exceptions should be researched more fully, especially with the calls for a wider TDM exception visible at a European Level. Specifically with regard to TDM, it would be both interesting and beneficial to do more research into the possibility of using TDM and copyright frameworks for analysing data which is not standard publishing offerings – for example patient data from the NHS. This would be an area which melds copyright law with data protection and privacy laws, as so often happens, and would be both interesting and beneficial to the general public and health services if a solution was to be found.

Further analysis of the adaptation of the publishing industry to the digital shift should be conducted at periodic intervals. Although this research project was an undertaking which attempted to analyse the adaptation of publishers to the digital shift, like any other research project, and especially given the rapid development of copyright in the five years of 2010-2015, new analyses will need to be conducted periodically to ensure that the industry is continuing to adapt to digital and not stagnating, or getting caught in old business models and old ways of thinking.

Final Remarks

There is no doubt that the increased profitability and innovation of copyright industries is something which would be advantageous for all parties involved, and greater access to creative

[76] Commission, 'Intellectual Property Rights (IPR) and Geographical Indications (GIs) in TTIP' (2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153020.7%20IPR,%20GIs%202.pdf> accessed 23 November 2015.

works is made possible by the advent of digital, and thus copyright restrictions should follow suit and adapt to the new paradigms which they have to deal with. But to say that copyright alone is strangling innovation and is the single biggest obstacle to innovation is to look at the situation far too simplistically. In some circumstances, such as with individual licences, it is not copyright itself that is inhibiting innovation, but the bureaucracy and red tape involved in obtaining those licences. However, with the cooperation of industry and government, solutions can be developed which will ease the burden of obtaining small licences, without negatively affecting the interests of any party. The answer to the machine, as Charles Clark said, is in the machine.[77] Cooperation between related parties is necessary in order to obtain and maintain the knife-edge balance which copyright must keep.

Thus, changes and reforms to copyright should be very carefully considered. Although certain aspects of copyright may not be entirely fit for purpose the solution to these copyright problems is not wholesale reform but carefully coordinated adaptation. Although it may take some time, industry solutions are possible, as is evidenced by the examples of PLSclear and PLSclear TDM, the PA Copyright Infringement Portal, CrossRef, and the future Copyright Hub. None of these initiatives have required legislative change, although some have had the support of government. Similarly, in terms of improving access to content, Open Access arose without the need for legislation, but rather through the coordinated support of interested parties, and will, with time, become an ever more important part of access to knowledge and open research. Equally, Operation Creative is seeing success in reducing amounts of consumer piracy through a combination of following the money and educating consumers about where to obtain legitimate content. This positive and cooperative nature is indicative of the future which lies ahead for copyright.

In returning to consider the epigraph from the introduction:

> Only one thing is impossible for God: to find any sense in any copyright law on the planet.[78]

We can consider this from a different angle. Although Mark Twain decried any copyright law on the planet, this thesis has instead shown that in many cases, copyright is succeeding in supporting hugely profitable, innovative, creative, and interesting industries. Thus, in order to improve the operation of the creative industries, legislative reform is often not the answer. Industry-supported,

---

[77] Charles Clark, *"The Answer to the Machine is in the Machine": And Other Collected Writings* (Institutt for Rettsinformatikk 2005).
[78] Mark Twain, 'Mark Twain's notebook', 1902-1903.

rights holder-led, and government-backed initiatives can show great success in paving the way forward to improve copyright materials for generations to come. Where legislative reform is necessary – as indeed it always will be – then such reform should be implemented only after lengthy consultation on a solid base of evidence – not lobbynomics[79] but solid academic submissions, robust economic forecasts, and verifiable impact assessments.

This thesis posed the question: 'Is copyright fit for purpose?' Throughout the course of this research, the author has shown that, on the whole, it is indeed fit for purpose, even in response to the digital shift. Copyright is succeeding in supporting a variety of interesting, innovative, creative, artistic, literary and developing industries. It is undeniable that there are some areas of copyright which are fit for change, but where this is necessary, such change should be undertaken with the utmost care and robust planning and forecasting, due to the delicate balance at play between related parties to the copyright debate. The copyright framework is not a static structure, and has always been subject to constant tweaking, updating, changing, and improving. There is no doubt that this will continue in the future – nobody can predict what new technologies will wreak havoc in the lives of rights holders and content users next, and copyright will have to adapt to deal with that. This thesis has shown, however, that all related parties in the copyright framework are capable of adapting to change, given sufficient time and incentive – it is in nobody's interest to let the content industries die, and indeed such a thing is almost unthinkable. It is simply worth noting that the copyright framework is large, complex, and multi-faceted, and thus when change comes, it is never as speedy as the changes to technology which necessitate copyright's adaptation.

Nonetheless, as this thesis has shown, copyright is largely fit for purpose, and will continue to be so in the future. Cooperation and balance are the key words which have cropped up again and again throughout this thesis, as the cornerstones of a thriving content creation economy, in the UK, Europe, and indeed around the world.

---

[79] Benjamin H Mitra-Kahn, 'Copyright, Evidence and Lobbynomics: The World After the UK's Hargreaves Review' (2011) 8(2) Review of Economic Research on Copyright Issues 65.

Index

I

L

M

N

O

P

Q

S

T

U

W

List of Abbreviations

ABS – Annual Business Survey

ACMA – Australian Communications and Media Authority

AFACT – Australian Federation Against Copyright Theft

ALAI – International Literary and Artistic Association

ALCS – Authors Licensing and Collecting Society

ALRC – Australian Law Reform Commission

APC – Article Processing Charge

API – Application Programming Interface

APNIC – Asia-Pacific Network Information Center (an issuer of IP addresses)

ARMT – Autorité de Régulations des Mésures Techniques

BCC – British Copyright Council

BIPRI – United International Bureaux for the Protection of Intellectual Property

BOAI – Budapest Open Access Institute

BPI – British Phonographic Industry

CAS – Copyright Alert System

CCUK – Creative Content UK

CDPA (1988) – Copyright, Designs and Patents Act 1988

CJEU – Court of Justice of the European Union

CLA – Copyright Licensing Agency

CMO – Collective Management Organisation

CRA – Charles River Associates

CRR Regulations – Copyright and Related Rights Regulations 2012 (Ireland)

CSA – Conseil Supérieur de l'Audiovisuel

CSPLA – Conseil supérieur de la propriété littéraire et artistique (France) [Council for the Protection of Literary and Artistic Property]

DCE – Digital Copyright Exchange

DCMS – Department for Culture, Media and Sport

DEA (2010) – Digital Economy Act 2010

DG – Directorate-General (European Commission)

DMCA – Digital Millennium Copyright Act (US)

DOAJ – Directory of Open Access Journals

DSM Strategy – Digital Single Market Strategy (European Commission)

ELT – English Language Teaching

EPO – European Patent Office

ERR Act – Electronic and Related Rights Act 2013

EU – European Union

FACT – Federation Against Copyright Theft (UK)

GATT – General Agreement on Tariffs and Trade

GDP – Gross Domestic Product

GESAC – European Grouping of Societies of Authors and Composers

GOSH – Great Ormond Street Hospital

GR – Graduated Response

GVA – Gross Value Added

HADOPI – Haute autorité pour la diffusion des œuvres et la protection des droits sur internet

HM Government – Her Majesty's Government

IAB UK – Internet Advertising Bureau UK

InfoSoc – Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

IOC – Initial Obligations Code

IP – Intellectual Property

IP Address – Internet Protocol Address

IPAP – Internet Protocol Address Providers

IPO – Intellectual Property Office [UK]

IPRs – Intellectual Property Rights

Irish SOPA – *see* CRR Regulations

ISIC – International Standard Industrial Classification of All Economic Activities

ISP – Internet Service Provider

ITO – International Trade Organization

IWL – Infringing Websites List

JISC – Joint Information Systems Committee

JRC – Joint Research Council

LIBER – Ligue des Bibliothèques Européennes de Recherche – Association of European Research Libraries

MCI – Media and Content Industries

MEP – Member of the European Parliament

MFN – Most Favoured Nation

MoU – Memorandum of Understanding

NACE – Statistical classification of economic activities in the European Community (from the French Nomenclature statistique des activités économiques dans la Communauté européenne)

NHS – National Health Service

NLA – Newspaper Licensing Agency

OA – Open Access

OCILLA – Online Copyright Infringement Liability Limitation Act

OECD – Organisation for Economic Cooperation and Development

Ofcom –Office of Communications (UK)

OHIM – Office for the Harmonization in the Internal Market

OSP – Online Service Provider

P2P – peer to peer [downloading]

PA – Publishers Association

PIPA – Protect Online Property Act (US)

PIPCU – (City of London) Police Intellectual Property Crime Unit

PLS – Publishers Licensing Society

PMA – post mortem auctoris [after the death of the author]

PRC – Publishing Research Consortium

PRS for Music – the Performing Right Society for Music (also incorporates the Mechanical Copyright Protection Society)

PwC – Pricewaterhouse Cooper

R&D – Research and Development

RCUK – Research Council (UK)

REF – Research Excellence Framework

SOC – Standard Occupational Classifications

SOPA – Stop Online Piracy Act (US)

STEM – Science, Technology, Engineering, and Maths

STM – Science, Technology and Medicine (Scientific, Technical and Medical)

SWOT Analysis – Strengths, Weaknesses, Opportunities and Threats Analysis

TD – Teachta Dála – Member of the Irish Parliament

TDM – Text and Data Mining

TPP – Trans-Pacific Partnership

TRIPS Agreement – Agreement on Trade-Related Aspects of Intellectual Property Rights

TTIP – Trans-Atlantic Trade and Investment Partnership

UCL – University College London

UCSC – University of California Santa Cruz

UK SIC – UK Standard Industrial Classifications

US – United States (of America)

USPTO – United States Patent and Trademark Office

VCAP – Voluntary Copyright Alert Program

VPN – Virtual Private Network (a method of browsing the internet as if it were a private network and disguising your location)

WCT – WIPO Copyright Treaty

WIPO – World Intellectual Property Organization

WPPT – WIPO Performances and Phonograms Treaty

WTO – World Trade Organization

Table of Cases

Australia

Roadshow Films Pty and others v iiNet Ltd [2012] HCA 16

Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23

Roadshow Films Pty Ltd v iiNet Limited (No 3) [2010] FCA 24

Canada

Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright) - 2012 SCC 37

Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada - 2012 SCC 34

Re:Sound v Motion Picture Theatre Associations of Canada - 2012 SCC 38

Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada - 2012 SCC 35

Society of Composers, Authors and Music Publishers of Canada v Bell Canada - 2012 SCC 36

Europe

Bestwater International (Case C-348/12)

Butterfly Music Srl v Carosello Edizioni Musicali e Discografiche Srl (CEMED) (Case C-60/98)

C More Entertainment (Case C-279/13)

Commission of the European Communities v French Republic (Case C-59/04)

Commission of the European Communities v Kingdom of Belgium (Case C-143/04)

Commission of the European Communities v Kingdom of Spain (Case C-31/04)

Commission of the European Communities v Kingdom of Sweden (Case C-91/04)

Commission of the European Communities v Republic of Finland (Case C-56/04)

Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Case C-88/04)

Ireland

UK

US

Table of Legislation

UK Statutes

Colonial Copyright Act 1847 (10 & 11 Vict c 95)

Communications Act 2003

Copyright (Musical Compositions) Act 1882 (45 & 46 Vict c 40)

Copyright (Musical Compositions) Act 1888 (51 & 52 Vict c 17)

Copyright Act 1709 (8 Ann c 21 or 8 Ann c 19)

Copyright Act 1775 (15 Geo 3 c 53)

Copyright Act 1836 (6 & 7 Will 4 c 110)

Copyright Act 1842 (5 & 6 Vict c 45)

Copyright Act 1956

Copyright, Designs and Patents Act 1988

Digital Economy Act 2010

Dramatic Copyright Act 1833 (3 & 4 Will 4 c 15)

Enterprise and Regulatory Reform Act 2013

Engraving Copyright Act 1734 (8 Geo 2 c 13)

Engraving Copyright Act 1766 (7 Geo 3 c 38)

Fine Arts Copyright Act 1862 (25 & 26 Vict c 68)

Copyright Act 1911 (1 & 2 Geo 5 c 46)

Lectures Copyright Act 1835 (5 & 6 Will 4 c 65)

Prints and Engravings Copyright (Ireland) Act 1836 (6 & 7 Will 4 c 59)

Prints Copyright Act 1777 (17 Geo 3 c 57)

Sculpture Copyright Act 1814 (54 Geo 3 c 56)

Short Titles Act 1896 (59 & 60 Vict c 14)

Supreme Court Act 1981

UK Statutory Instruments

Artist's Resale Right Regulations 2006, SI 2006/346

Copyright (Public Administration) Regulations 2014, SI 2011/1385

Copyright (Regulation of relevant licensing bodies) Regulations 2014, SI 2014/898

Copyright and Related Rights Regulations 2003, SI 2003/2498

Copyright and Rights in Performances (Disability) Regulations 2014, SI 2014/1384

Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014 SI 2014/2361

Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356

Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014, SI 2014/1372

Draft Statutory Instrument – The Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2011

Other Territories

Australia

Copyright Act 1968

Copyright Amendment (Online Infringement) Act 2015

Canada

Copyright Act RSC 1985 c C-42

Copyright Modernization Act 2012

France

Code de la Propriété Intellectuelle (Livre I - Titre II)

Décret no 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L 331-21 du code de la propriété intellectuelle

loi no 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet

Germany

Achtes Gesetz zur Änderung des Urheberrechtsgesetzes Vom 7 Mai 2013

India

Copyright (Amendment) Act 2012

Ireland

Copyright and Related Rights Act 2000

European Union (Certain Permitted Uses of Orphan Works) Regulations 2014, SI 2014/490

European Union (Copyright and Related Rights) Regulations 2012, SI 2012/59

New Zealand

Copyright (Infringing File Sharing) Amendment Bill 2010 No 119-1

Copyright (Infringing File Sharing) Amendment Act 2011

Copyright (Infringing File Sharing) Regulations 2011 SI 2011/252

Copyright Act 1994

Spain

Ley 22/1987, de 11 de noviembre, de Propiedad Intelectual: *Boletín Oficial del Estado* núm. 275, del 17 de noviembre de 1987

United States

A Bill to promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property, and for other purposes —HR 3261 (2011)

Articles of Confederation and Perpetual Union (1781)

Copyright Act 1790, 1 Statutes At Large 124

Copyright Act 1831, 4 Statutes at Large 436

Digital Millennium Copyright Act 1998, Public Law 105–304

Trade Act 1974, Public Law 93-618

United States Constitution

EU Directives

Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L122/42

Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L346/61

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L248/15

Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights [1993] OJ L290/9

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [2001] OJ L167/10

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L272/32

Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L195/16

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [2006] OJ L376/28

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L372/12

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L111/16

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works [2012] OJ L299/5

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical

works for online use in the internal market [2014] OJ L84/72

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L77/20

Treaties, Conventions, and Agreements

Agreement between the United Nations and the World Intellectual Property Organization, 1974.

Agreement on Trade-Related Aspects of Intellectual Property, 1994

Berne Convention for the Protection of Literary and Artistic Works, 1886

Berlin Act (1908)

Rome Act (1928)

Brussels Act (1948)

Stockholm Act (1967)

Paris Act (1971)

Buenos Aires Convention on Literary and Artistic Copyright, 1910

Convention Establishing the World Intellectual Property Organization, 1970

EU Community Acquis

General Agreement on Tariffs and Trade, 1947

General Agreement on Tariffs and Trade, 1994

Paris Convention for the Protection of Industrial Property, 1883

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961

Treaty Establishing the European Economic Community, 1957

Treaty on the Functioning of the European Union, 2007

WIPO Performances and Phonograms Treaty, 1996

WIPO Copyright Treaty, 1995

Bibliography

Books

Armstrong E, *Before Copyright: the French book-privilege system 1498–1526* (CUP 1990)

Auger CP, *Information Sources in Grey Literature* (4th edn, KG Saur 1998)

Barrie JM, *Peter Pan; or The Boy Who Wouldn't Grow Up* (Hodder & Stoughton 1911)

Bently L and Sherman B, *Intellectual Property Law* (3rd edn, OUP 2009)

– –, Sherman B, *Intellectual Property Law* (4th edn, OUP 2014)

Bettig RV, *Copyrighting Culture: The Political Economy of Intellectual Property* (Westview Press 1996)

Bindoff ST, *Tudor England* (Penguin Books 1950)

Caddick N, Davies G and Harbottle G, *Copinger and Skone Jones on Copyright* (16th edn, Sweet and Maxwell 2010)

– –, Davies G and Harbottle G, *Copinger and Skone Jones on Copyright* (2nd supp, 16th edn, Sweet and Maxwell 2013)

Clark C, *"The Answer to the Machine is in the Machine": And Other Collected Writings* (Institutt for Rettsinformatikk 2005)

Cohen IB, *Howard Aiken: Portrait of a Computer Pioneer* (1999 MIT Press)

Copeland BJ, *Colossus: The First Electronic Computer: The secrets of Bletchley Park's Code-breaking computers* (2006 OUP)

Creswell JW and Plano Clark VL, *Designing and conducting mixed methods research* (Sage 2007)

Dewey J, *Experience and nature* (Kessinger 1925)

Dutfield G, Suthersanen U, *Global Intellectual Property Law* (Edward Elgar 2008)

Fragnito G, *Church, censorship and culture in early modern Italy* (Adrian Belton tr, CUP 2001)

Geist M, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (University of Ottawa Press 2013)

Grimal P, *A Concise Dictionary of Classical Mythology* (Stephen Kershaw ed, AR Maxwell-Hyssop tr) (Blackwell 1986)

Han J, Kamber M, and Pei J, *Data Mining Concepts and Techniques* (3rd edn, Elsevier 2012)

Jacob R, Alexander D and Fisher M, *Guidebook to Intellectual Property* (6th edn, Hart 2013)

Jedin H (ed), *History of the Church: The Church in the Modern Age* (Volume 10, Crossroad Publishing 1981)

Landes W and Posner RA, *The Economic Structure of Intellectual Property Law* (Harvard University Press 2003)

Lessig L, *Free culture: How big media uses technology and the law to lock down culture and control creativity* (Penguin 2004)

Lévêque F and Ménière Y, *The Economics of Patents and Copyright* (Berkeley Electronic Press 2004)

MacQueen HL, Waelde C and Laurie GT, *Contemporary Intellectual Property: Law and Policy* (OUP 2007)

Mitchell HC, *The Intellectual Commons: Towards an Ecology of Intellectual Property* (Lexington Books 2005)

Nagle E, *Intellectual Property Law* (Round Hall 2012)

Neuman WL, *Social Research Methods: Qualitative and Quantitative Approaches: Quantitative and Qualitative Methods* (7th edn, Pearson 2010)

Patterson LR, *Copyright in Historical Perspective* (Vanderbilt University Press 1968)

Patterson LR and Lindberg SW, *The Nature of Copyright: A Law of Users' Rights* (University of Georgia Press 1991)

Ploman EW and Hamilton LC, *Copyright: Intellectual Property in the Information Age* (Routledge & Kegan Paul 1980)

Rees F, *Johannes Gutenberg: Inventor of the Printing Press* (Compass Point Books 2005)

Rorty R, *Philosophy and social hope* (Penguin 1999)

Rose M, *Authors and owners: the invention of copyright* (Harvard University Press 1993)

Seftleben M, *Copyright Limitations and the Three-Step Test* (Information Law Series Set Vol 13, Kluwer Law International 2004)

Stallman R, *Free Software, Free Society: Selected Essays of Richard M Stallman* (Free Software Foundation, Inc 2006)

Stock WG, Stock M, *Handbook of Information Science* (De Gruyter 2013)

Tritton G and others, *Intellectual Property in Europe* (3rd edn, Sweet and Maxwell 2007)

– –, and others, *Intellectual Property in Europe* (4th edn, Sweet and Maxwell 2014)

Vitoria M and others, *The Laddie, Prescott and Vitoria: The Modern Law of Copyright and Designs* (4th edn, LexisNexis 2011)

Wayner P, *Free For All – How Linux and the Free Software Movement Undercut the High Tech Titans* (Harper Business 2000)

Williams K, *Read All About It!: A History of the British Newspaper* (Routledge 2009)

Wilton IH, Frank E, *Data Mining: Practical Machine Learning Tools and Techniques* (2nd edn, Elsevier 2005)

Yu PK, *Intellectual Property and Information Wealth: Copyright and related rights* (Greenwood Publishing Group 2007)

Zikopolous P and Eaton C, *Understanding Big Data: Analytics for Enterprise Class Hadoop and Streaming Data* (McGraw-Hill Osborne 2011)

Conference Papers and Speeches

Barnier M, 'Licences for Europe: quality content and new opportunities for all Europeans in the digital era' (Speech at the Launch of the initiative 'Licences for Europe', 4 February 2013) <http://europa.eu/rapid/press-release_SPEECH-13-97_en.htm> accessed 18 December 2015

Cameron D, (East End Tech City Speech, 4 November 2010) <http://webarchive.nationalarchives.gov.uk/20130109092234/http://number10.gov.uk/news/east-end-tech-city-speech/> accessed 19 November 2015

Corrigan R, 'Colmcille and the Battle of the Book: Technology, Law and Access to Knowledge in 6th Century Ireland' (GikII 2 Workshop on the intersections between law, technology and

popular culture, University College London, 19 September 2007) <http://oro.open.ac.uk/10332/> accessed 15 January 2016

Hearst MA, 'Untangling Data Mining' (The 37th Annual Meeting of the Association for Computational Linguistics, University of Maryland, June 1999)

Karaganis J, 'Copyright Infringement and Enforcement in the US' (2011) (American Assembly, Columbia University) <http://piracy.americanassembly.org/wp-content/uploads/2011/11/AA-Research-Note-Infringement-and-Enforcement-November-2011.pdf> accessed 25 November 2015

Lauinger T and others, 'Clickonomics: Determining the Effect of Anti-Piracy Measures for One-Click Hosting' (Network and Distributed System Security Symposium, San Diego, 24-27 February 2013)

Lynch R, 'Digital disruption or simply meddling: what next for copyright and enforcement?' (PLS Open Meeting Speech, 1 July 2015). <https://www.youtube.com/watch?v=4dLw4-Hzh-A> accessed 12 November 2015

Milton J, 'Areopagitica; A speech of Mr John Milton for the Liberty of Unlicenc'd Printing, to the Parlament of England' (1644)

Piatek M, Kohno T and Krishnamurthy A, 'Challenges and Directions for Monitoring P2P File Sharing Networks - or - Why My Printer Received a DMCA Takedown Notice' (HotSec Conference, San Jose, 29 July 2008) <http://dmca.cs.washington.edu/uwcse_dmca_tr.pdf> accessed 23 September 2015

Preston D, 'Open Source Learning' (TED Talk, *TEDxUCLA,* 27 October 2012) <http://tedxucla.org/2014/09/25/david-preston/> accessed 12 November 2015

Sagiroglu S and Sinanc D, 'Big Data: A Review' (Collaboration Technologies and Systems (CTS), 2013 International Conference, May 2013)

Wischenbart R, 'Global Trends in Publishing 2014: An overview of current developments and driving forces in the transformation of the international publishing industry' (Frankfurt Book Fair, 7-12 October 2014) <http://www.pik.org.pl/upload/files/Global_Trends_in_Publishing_2014.pdf> accessed 7 January 2016

Contributions to Edited Collections

– –, 'An Act for the Encouragement of Learning (Draft)' (1737) Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1737b> accessed 15 January 2016

– –, 'Charles II, 1662: An Act for preventing the frequent Abuses in printing seditious treasonable and unlicensed Bookes and Pamphlets and for regulating of Printing and Printing Presses', in John Raithby (ed) *Statutes of the Realm: Volume 5, 1628-80* <http://www.british-history.ac.uk/statutes-realm/vol5/pp428-435> accessed 17 November 2015

– –, 'Information for Mess John Hinton of London, Bookseller, and Alexander Mackonochie, Writer in Edinburgh, his Attorney, Pursuers; against Mess Alexander Donaldson and John Wood, Booksellers in Edinburgh, and James Meurose, Bookseller in Kilmarnock, Defenders (January 2 1773)' in S Parks (ed) *The Literary Property Debate: Six Tracts, 1764-1774* (Garland 1975)

– –, 'Reasons for objecting to the renewal of the Licensing Act, London' (1695), in Lionel Bently and Martin Kretschmer (eds), *Primary Sources on Copyright (1450-1900)* (www.copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1695> accessed 17 November 2015

– –, 'Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, London' (1706) Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1706> accessed 17 November 2015

– –, 'Reasons Humbly Offer'd for the Bill for the Encouragement of Learning, London' (1706) Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1709> accessed 17 November 2015

– –, 'Usher's Printing Privilege, Massachusetts (1672)' in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org)

Chothia T and others, 'The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent' in Keromytis AD and di Pietro R (eds) *Security and Privacy in Communication Networks* (Springer 2013)

Deazley R, 'Commentary on *Donaldson v Becket* (1774)' (2008) in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org)

– –, 'Commentary on *Hinton v Donaldson* (1773)' (2008), in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org)

– –, 'Commentary on the Statute of Anne 1710' (2008) in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org)

– –, 'Commentary on *Tonson v Collins* (1762)' (2008), in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (copyrighthistory.org)

Defoe D, 'Defoe's Essay on the Press, London (1704)', in Lionel Bently and Martin Kretschmer (eds) *Primary Sources on Copyright (1450-1900)* (www.copyrighthistory.org) <http://www.copyrighthistory.org/record/uk_1704> accessed 17 November 2015

Grendler PF, 'Printing and censorship' in Charles B Schmitt (ed), *The Cambridge History of Renaissance Philosophy* (CUP 1988)

Mahoney J, Rueschemeyer D, 'Comparative Historical Analysis: Achievement and Agendas' in Mahoney J, Rueschemeyer D (eds), *Comparative Historical Analysis in the Social Sciences* (CUP 2003)

Pouwelse J and others, 'The Bittorrent P2P File-Sharing System: Measurements and Analysis' in Castro M and van Renesse R (eds) *Peer to Peer Systems IV* (Springer 2005)

Teddlie C and Tashakkori A, 'Mixed Methods Research: Contemporary Issues in an Emerging Field' in Denzon NK and Lincoln YS (eds) *The SAGE Handbook of Qualitative Research* (SAGE 2011)

Consultations, Reports, Reviews, and Working Papers

– –, Memorandum of Understanding, (*Center for Copyright Information,* 6 July 2011) <http://www.copyrightinformation.org/wp-content/uploads/2013/02/Memorandum-of-Understanding.pdf> accessed 15 December 2015

ALAI, 'Opinion Proposed to the Executive Committee and adopted at its meeting, 17 September 2014 on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the

public' (2014) <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf> accessed 13 January 2016

Association for Computer Machinery US Public Policy Council, 'Analysis of SOPA's impact on DNS and DNSSEC' (2012) <http://usacm.acm.org/images/documents/DNSDNSSEC.pdf> accessed 14 January 2016

Association of Learned and Society Publishers, 'ALPSP response to Independent Review of Intellectual Property and Growth' <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-alpsp.pdf> accessed 14 January 2016

Australian Law Reform Commission, 'Copyright and the Digital Economy' (2012) ALRC Issues Paper 42

– –, 'Copyright and the Digital Economy' (2013) ALRC Discussion Paper 79

– –, 'Copyright and the Digital Economy: Final Report' (2013) ALRC Report 122

Boulanger J and others, 'Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU: Analysis of specific policy options' (2014) <http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf> accessed 12 January 2016

British Copyright Council, 'Independent Code Review' (2014) <http://www.independentcodereview.org.uk/files/8413/8979/6209/ICR_Consultation_Paper_090114.pdf> accessed 16th January 2016

– –, 'Principles for Collective Management Organisations' Codes of Conduct' (2012) <http://www.britishcopyright.org/files/2614/1312/8143/BCCPGP_Policy_Framework_250512.pdf> accessed 21 December 2015

Camerani R and others, 'Private Copying' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309681/ipresearch-private-150313.pdf> accessed 12 January 2016

Center for Copyright Information, 'The Copyright Alert System: Phase One and Beyond' (2014)

Center for Strategic and Innovation Studies, 'Net Losses: Estimating the Global Cost of Cybercrime' (2014) <www.mcafee.com/uk/resources/reports/rp-economic-impact-cybercrime2.pdf> accessed 20 January 2016

CLA, ACLS, PLS and DACS, 'Consultation on the UK's Extended Collective Licensing Scheme' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308298/alcplcdac.pdf> accessed 15 October 2015

Clark J, 'Text Mining and Scholarly Publishing' (2012) Publishing Research Consortium

Commission on Intellectual Property Rights, 'Integrating Intellectual Property Rights and Development Policy' (2002)

Common Law Institute for Intellectual Property, 'The Economic Importance of Copyright' (1985)

––, 'The Economic Importance of Copyright' (1993)

Communications Alliance, 'Industry Code C653:2015 Copyright Notice Scheme, Public Comment Version-20/2/15' <http://www.commsalliance.com.au/__data/assets/pdf_file/0005/47570/DR-C653-2015.pdf> accessed 22 December 2015

––, 'Industry Code C653:2015 Copyright Notice Scheme' <www.commsalliance.com.au/__data/assets/pdf_file/0005/48551/C653-Copyright-Notice-Scheme-Industry-Code-FINAL.pdf> accessed 22 December 2015

Comreg, 'Quarterly Key Data Report, Q1 2010' (2010)

––, 'Quarterly Key Data Report Data as of Q2 2015' (2015)

Copyright Review Committee, 'Copyright and Innovation: A Consultation Paper' (2012)

––, 'Modernising Copyright: The Report of the Copyright Review Committee' (2013)

Digital Citizens Alliance, 'Good Money Gone Bad. Digital Thieves and the Hijacking of the Online Ad Business: A Report on the Profitability of Ad-Supported Content Theft' (2014) <http://media.digitalcitizensactionalliance.org/314A5A5A9ABBBBC5E3BD824CF47C46EF4B9D3A76/4af7db7f-03e7-49cb-aeb8-ad0671a4e1c7.pdf> accessed 14 January 2016

Economics and Statistics Administration, United States Patent and Trademark Office, 'Intellectual Property and the US Economy: Industries in Focus' (2012) <http://www.uspto.gov/sites/default/files/news/publications/IP_Report_March_2012.pdf> accessed 11 January 2016

Electronic Frontier Foundation, 'RIAA v The People: Five Years Later' (2008) <https://www.eff.org/files/eff-riaa-whitepaper.pdf> accessed 14 January 2016

EPO, OHIM, 'Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union, industry-Level Analysis Report' (2013) <http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf> accessed 11 January 2016

Ernst and Young, 'Creating Growth: Measuring cultural and creative markets in the EU' (2014) <http://www.ey.com/Publication/vwLUAssets/Measuring_cultural_and_creative_markets_in_the_EU/$FILE/Creating-Growth.pdf> accessed 30 November 2015

European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 *Svensson*' (2013) <https://sites.google.com/site/ipkatreaders/articles/ECS%20Svensson%20opinion%20final.pdf> accessed 13 January 2016

European Publishers Council, 'Submission from the European Publishers Council to the Independent Review of Intellectual Property and Growth – The Hargreaves Review - March 2011' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-europepub.pdf> accessed 14 January 2016

Filippov S, 'Mapping Text and Data Mining in Academic and Research Communities in Europe' (2014) 16/2014 Lisbon Council Special Briefing

Google Transparency Report, 'Requests to remove content: Due to copyright' <http://www.google.com/transparencyreport/removals/copyright/> accessed 21 September 2015, <https://www.dropbox.com/s/fmqq01t7gr6m86u/Screenshot%202015-09-21%2014.41.15.png?dl=0> accessed 21 January 2016

– –, 'Reporting Organization: The Publishers Association' <http://www.google.com/transparencyreport/removals/copyright/reporters/141/The-Publishers-Association/> accessed 14 November 2015

Google and PRS for Music, 'The six business models for copyright infringement: A data-driven study of websites considered to be infringing copyright' (2012) <https://docs.google.com/file/d/0Bw8Krj_Q8UaENDhEOG1LVFRhVkU/view> accessed 14 January 2016

Gowers A, 'Gowers Review of Intellectual Property in the UK' (2006)

Hadopi, 'Access to Works on the Internet' (2013) <http://www.hadopi.fr/sites/default/files/HadopiAccesstoWorksontheInternet.pdf> accessed 22 December 2015

– –, 'Hadopi, 1 an ½ après son lancement' (2012) (French) <hadopi.fr/sites/default/files/page/pdf/note17.pdf> accessed 22 December 2015.

Hargreaves I, 'Call for Evidence: Independent Review of Intellectual Property and Growth' (2010) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e.pdf> accessed 14 December 2015

– –, 'Digital Opportunity: A Review of Intellectual Property and Growth' (2011)

HEFCE, 'Policy for open access in the post-2014 Research Excellence Framework' (2014) <http://www.hefce.ac.uk/media/hefce/content/pubs/2014/201407/HEFCE2014_07.pdf> accessed 13 January 2016

– –, 'Policy for open access in the post-2014 Research Excellence Framework Updated July 2015' (2015) <http://www.hefce.ac.uk/media/HEFCE,2014/Content/Pubs/2014/201407/HEFCE2014_07_updated%20July%202015.pdf> accessed 13 January 2016

Hooper R, 'Rights and Wrongs: Is Copyright Licensing Fit For Purpose in the Digital Age?' (2012) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase1.pdf> accessed 14 December 2015

– –, and Lynch R, 'Copyright Works: Streamlining copyright licensing for the digital age' (2012) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase2.pdf> accessed 21 December 2015

IFPI, 'Digital Music Report 2009' (2009)

– –, 'Recording Industry in Numbers' (2014)

International Association of Scientific, Technical and Medical Publishers, 'STM Submission for the Independent Review of Intellectual Property and Growth' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-istm.pdf> accessed 14 January 2016

International Intellectual Property Alliance, '2014 Special 301 Report' (2014)

JISC, 'The Value and Benefit of Text Mining to UK Further and Higher Education Digital Infrastructure' (2012) <http://bit.ly/jisc-textm> accessed 12 January 2016

Kantar Media Monitoring, 'OCI Tracker Benchmark Study 'Deep Dive' Analysis Report' (2013) <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/deep-dive.pdf> accessed 25 November 2015

– –, 'Online Copyright Infringement Tracker Wave 5' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/449592/new_OCI_doc_290715.pdf> accessed 15 December 2015

Lescure P, 'Mission "Acte II de l'exception culturelle" Contribution aux politiques culturelles à l'ère numérique' (2013)

Leurdijk A and others, 'Statistical, ecosystems and competitiveness analysis of the media and content industries' (2012)

– –, Slot M, and Nieuwenhuis O, 'Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry' (2012)

LIBER, 'LIBER Response to the Public Consultation on the review of the EU copyright rules' (2014) <http://libereurope.eu/wp-content/uploads/Public%20Copyright%20Consultation%20Response.pdf> accessed 30 March 2015

– –, 'Text and Data Mining: The Need for a Change in Europe' (2014) <http://libereurope.eu/wp-content/uploads/2014/11/Liber-TDM-Factsheet-v2.pdf> accessed 21 March 2015

Martin J and de Carvalho L, 'Mission sur l'exploration de données' (July 2014) <http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux-du-CSPLA/Missions/Mission-du-CSPLA-relative-au-text-and-data-mining-exploration-de-donnees> accessed 30 March 2015

National Centre for Text Mining, 'Text Mining and IP: Submission to the Independent Review of IP and Growth from the National Centre for Text Mining' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-nctm.pdf> accessed 17 March 2015

Ofcom, '"Site Blocking" to reduce online copyright infringement' (2010) <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf> accessed 19 December 2015

– –, 'Implementation of the Online Infringement of Copyright (Initial Obligations) (Sharing of Costs) Order 2012' (2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/onlinecopyright/summary/condoc.pdf> accessed 22 December 2015

– –, 'Notice of Ofcom's proposal to make by order a code for regulating the initial obligations' (2012) <http://stakeholders.ofcom.org.uk/binaries/consultations/online-notice/summary/notice.pdf> accessed 22 December 2015

– –, 'Online Infringement of Copyright and the Digital Economy Act 2010 Draft Initial Obligations Code' (2010) <http://stakeholders.ofcom.org.uk/binaries/consultations/copyright-infringement/summary/condoc.pdf> accessed 22 December 2015

Office for National Statistics, 'Annual Business Survey' (*Office for National Statistics*) <http://www.ons.gov.uk/ons/rel/abs/annual-business-survey/index.html> accessed 17 December 2015

Oxford Economics, 'Consultation on Copyright: Comments on Economic Impacts' (2011)

Pallante M, 'Copyright and the Music Marketplace: a report of the register of copyrights' (2015) <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> accessed 8 October 2015

– –, 'The Register's Call for Updates to US Copyright law' (March 20, 2013) <http://copyright.gov/regstat/2013/regstat03202013.html> accessed 9 October 2015

– –, 'The Register's Perspective on Copyright Review' (April 29, 2015) <http://copyright.gov/laws/testimonies/042915-testimony-pallante.pdf> accessed 9 October 2015

Pew Research Media, 'E-Reading Rises as Device Ownership Jumps' (2014) <http://www.pewinternet.org/files/old-media//Files/Reports/2014/PIP_E-reading_011614.pdf> accessed 30 November 15

Pricewaterhouse Cooper, 'An Economic Analysis of Copyright, Secondary Copyright and Collective Licensing' (2011)

– –, 'An Economic Analysis of Education Exceptions in Copyright' (2012)

– –, 'The Economic Contribution of Australia's Copyright Industries 2002 – 2014' (2015)

Professional Publishers Association, 'Independent Review of Intellectual Property and Growth PPA Response – March 2011' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-ppa.pdf> accessed 14 January 2016

Publishers Association, 'Driving Innovation: Delivering Growth' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-thpa.pdf> accessed 16 December 2015

– –, 'Memorandum from the Publishers Association', Appendix 20, Select Committee on Science and Technology Written Evidence (2004)

– –, 'PA Statistics Yearbook' (2013)

Publishers Licensing Society, 'Independent review of Intellectual Property and growth PLS response to call for Evidence' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-pls.pdf> accessed 14 January 2016

RCUK, 'RCUK Policy on Open Access and Supporting Guidance' (2012) <http://www.rcuk.ac.uk/RCUK-prod/assets/documents/documents/RCUKOpenAccessPolicy.pdf> accessed 13 January 2016

Reda J, 'Draft Report on the implementation of Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' (2015) European Parliament Committee on Legal Affairs <https://pub.juliareda.eu/copyright_evaluation_report.pdf> accessed 18 December 2015

Shaheed F, 'Report of the Special Rapporteur in the field of cultural rights: Copyright policy and the right to science and culture' (2015)

Simon JP and de Prato G, 'Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Book Publishing Industry' (2012)

Smit E and van der Graaf M, 'Journal Article Mining, A research study into Practices, Policies, Plans ... and Promises.' (2011) BV Bronfonteyn

Taylor Wessing, 'Global Intellectual Property Index 4 Report' (2013)

The Expert Group, 'Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining' (2014) <http://ec.europa.eu/research/innovation-union/pdf/TDM-report_from_the_expert_group-042014.pdf> accessed 18 December 2015

Traille JP, de Meeûs d'Argenteuil J and de Francquen A, 'Study on the legal framework of text and data mining (TDM)' (2014) <http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf> accessed 12 January 2016

Trans-Pacific Partnership, 'IP Chapter' (2015) <http://keionline.org/sites/default/files/Section-G-Copyright-Related-Rights-TPP-11May2015.pdf> accessed 14 January 2016

United Nations Global Pulse, 'Big Data for Development: Challenges & Opportunities' (2012)

UK Music, 'The Economic Contribution of the Core UK Music Industry' (2012) <http://www.ukmusic.org/assets/general/The_Economic_Contribution_of_the_Core_UK_Music_Industry___WEB_Version.pdf> accessed 29 December 2015

US Trade Representative, '2015 Special 301 Report' (2015)

Weatherly M, '"Follow the Money": Financial Options To Assist In The Battle Against Online IP Piracy' (Discussion Paper) (2014) <http://www.olswang.com/media/48204227/follow_the_money_financial_options_to_assist_in_the_battle_against_online_ip_piracy.pdf> accessed 14 January 2016

WIPO, 'Guide on Surveying the Economic Contribution of Copyright Industries' (2003)

––, 'Guide on Surveying the Economic Contribution of Copyright Industries' (2015 Revised Edition)

––, 'International Survey on Private Copying Law & Practice' (2013) <http://www.wipo.int/edocs/pubdocs/en/copyright/1037/wipo_pub_1037_2013.pdf> accessed 23 November 2015

––, 'WIPO Studies on the Economic Contribution of the Copyright Industries: Overview' (2014) <http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/economic_contribution_analysis_2014.pdf> accessed 17 December 2015

Wischenbart R and others, 'Global eBook: A report on market trends and developments. Update fall 2014' (2014)

Working Group on Expanding Access to Published Research Findings, 'Accessibility, sustainability, excellence: how to expand access to research publications' (2012)

European Union Documents

Commission Documents

Commission, 'A Copyright Policy for Creativity and Innovation in the European Union' (2014) (Draft) (White Paper) <https://dropbox.com/s/oxcflgrav01tqlb/White%20Paper%20%28internal%20draft%29%20%281%29.PDF> accessed 13 January 2016

– –, 'A Digital Single Market Strategy for Europe' (Draft) (Communication) <http://g8fip1kplyr33r3krz5b97d1.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/Digital-Single-Market-Strategy.pdf> accessed 11 January 2016

– –, 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen' (Press Release, 6 May 2015)

– –, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final

– –, 'Copyright – Commission launches public consultation' (Press Release, 5 December 2013) <http://europa.eu/rapid/press-release_IP-13-1213_en.htm?locale=en> accessed 18 December 2015

– –, 'Creating a Digital Single Market: Bringing Down Barriers to Online Opportunities' (2015) <http://europa.eu/rapid/attachment/IP-15-6261/en/Factsheet_1_PORTABILITY_FINAL.pdf> accessed 11 December 2015

– –, 'Digital Single Market' (*European Commission,* 2015) <http://ec.europa.eu/priorities/digital-single-market/> accessed 13 January 2016

– –, 'Draft Impact Assessment on the modernisation of the EU copyright acquis' (2014) <http://statewatch.org/news/2014/may/eu-draft-impact-assessment-copyright-acquis.pdf> accessed 13 January 2016

– –, 'Ensuring the cross-border portability of online content services in the internal market' (Proposal for a Regulation) COM (2015) 627 final

– –, 'Have your say on the enforcement of intellectual property rights' (*European Commission,* 9 December 2015) <http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8580> accessed 13 January 2016

– –, 'Implementing Regulation (EU) No 1164/2013 of 7 November 2013 entering a name in the register of protected designations of origin and protected geographical indications [Waterford Blaa/Blaa (PGI)]' OJ L309/15

– –, 'In Focus: The Trans-Atlantic Trade Investment Partnership' (*European Commission: Trade*) <http://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 19 December 2015

– –, 'Intellectual Property Rights (IPR) and Geographical Indications (GIs) in TTIP' (2015) http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153020.7%20IPR,%20GIs%202.pdf accessed 23 November 2015

– –, 'List of Participants in Working Group 2 – User-Generated Content and Licensing for Small-scale Users of Protected Material' (2013) <http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/131213_wg2-list-of-participants.pdf> accessed 30 November 2015

– –, 'List of Participants in Working Group 4 – Text and Data Mining' (2013) <http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/131213_wg4-list-of-participants.pdf> accessed 30 November 2015

– –, 'Public Consultation on the review of the EU copyright rules' (2013) <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm> accessed 13 January 2016

– –, 'Report on the responses to the Public Consultation on the Review of the EU Copyright Rules' (2014) <http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf> accessed 21 December 2015

– –, 'Towards a modern, more European copyright framework' (Communication) COM (2015) 626 final.

– –, 'Towards better access to scientific information: Boosting the benefits of public investments in research' (Communication) COM (2012) 401 final

Other EU Documents

European Parliament Committee on Legal Affairs, 'Draft Agenda: Meeting Wednesday 6 May 2015' JURI (2015)0506_1 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+JURI-OJ-20150506-1+01+DOC+PDF+V0//EN> accessed 13 January 2016

European Parliament, 'Text Adopted' P8_TA-PROV (2015)0273 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2015-0273+0+DOC+PDF+V0//EN> accessed 13 January 2016

– –, 'Texts adopted, 4 February 2014' (*European Parliament)* <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2014-0056&language=EN&ring=A7-2013-0281> accessed 21 December 2015

Licences for Europe, 'Ten pledges to bring more content online' (2013) <http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf> accessed 21 December 2015

– –, 'Text and Data Mining Working Group (WG4)' (2013) <http://ec.europa.eu/licences-for-europe-dialogue/en/content/text-and-data-mining-working-group-wg4> accessed 21 December 2015

Reda J, 'Amendments 1-280 Draft Report – On the implementation of Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' (5 March 2015) <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE549.435> accessed 13 January 2016

– –, 'Amendments 281-556 Draft Report – On the implementation of Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society' (5 March 2015)' <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&mode=XML&language=EN&reference=PE549.469> accessed 13 January 2016

Journal Articles

Adermon A, Liang C-Y, 'Piracy and music sales: The effects of an anti-piracy law' (2014) 105 Journal of Economic Behavior and Organization 90

Ananiadou S and others, 'Supporting the Education Evidence Portal via Text Mining' (2010) Philosophical Transactions of the Royal Society 368

Arnold MA and others, 'Graduated Response Policy and the Behavior of Digital Pirates: Evidence from the French Three-Strike (Hadopi) Law' (2014) SSRN <http://ssrn.com/abstract=2380522> accessed 22 December 2015

Arnold R, 'A Fresh and Thought-Provoking Treatment of Copyright Law' (2011) 6(6) JIPLP 409

Batchelor B and others, 'Case Comment: Copying Levies: Moving Towards Harmonisation? The European Court Rules on the Concept of Fair Compensation for Rightholders' (2011) 32(6) European Competition Law Review 277

Beall J, 'Predatory publishers are corrupting open access' (2012) 489 Nature 179

––, 'Predatory publishing is just one of the consequences of gold open access' (2013) 26(2) Learned Publishing 79

Bernt Hugenholtz P, 'Law and Technology Fair Use in Europe' (2013) 56(5) Communications of the ACM 26

Björk BC and Solomon DJ, 'Open access versus subscription journals: a comparison of scientific impact' (2012) 10(73) BMC Medicine

Bohannon J, 'Who's Afraid of Peer Review?' (2013) 342 Science 60

Bridy A, 'Graduated Response American Style: "Six Strikes" Measured Against Five Norms' (2012) 23 Fordham Intellectual Property Media and Entertainment Law Journal 1

––, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (2010) 89 Oregon Law Review 81

Carrier MA, 'SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements' (2013) 11(2) Northwestern Journal of Technology and Intellectual Property 21

Chowdhury AR, 'The Future of Copyright in India' (2008) 3(2) JIPLP 102

Cobia J, 'The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process' (2009-10) 10(1) Minnesota Journal of Law, Science and Technology 387

Cox J and Collins A, 'Sailing in the same ship? Differences in factors motivating piracy of music and movie content' (2014) 50 Journal of Behavioral and Experimental Economics 70

Crompton S, 'Hargreaves Review Lacks Detail and Ambition' (June 2011) Managing Intellectual Property 12

Dallon CW, 'The Problem with Congress and Copyright Law: Forgetting the Past and Ignoring the Public Interest' (2004) 44 Santa Clara Law Review 365

Danaher B and others, 'The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France' (2012) SSRN <http://ssrn.com/abstract=1989240> accessed 22 December 2015

Dejean S, Pénard T and Suire R, 'Une première évaluation des effets de la loi Hadopi sur les pratiques des Internautes français' (2010) (French) <http://www.marsouin.org/IMG/pdf/NoteHadopix.pdf> accessed 22 December 2015

Dittmar JE, 'Information Technology and Economic Change: The Invention of the Printing Press' (2011) 126(3) The Quarterly Journal of Economics 1133

Donner I, 'The Copyright Clause of the US Constitution: Why Did the Framers Include It with Unanimous Approval?' (1992) 36(3) The American Journal of Legal History 361

Drassinower A, 'From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law' (2008) 34 Journal of Corporation Law 991

Drath R, 'Hotfile, Megaupload, and the Future of Copyrignt on the Internet: What can Cyberlockers Tell Us About DMCA Reform' (2012) 12(vi) The John Marshall Review of Intellectual Property Law 205

Dworkin RM, 'Is Wealth A Value?' (1980) 9(2) Journal of Legal Studies 191

Editorial, 'Gold in the Text?' (2012) 483 Nature 124

Elliott MS and Scacchi W, 'Mobilization of software developers: the free software movement' (2008) 21(1) Information Technology & People 4

Espantaléon J, 'Another Google Copyright Story' (2011) 6(10) JIPLP 696

Favale M, Kretschmer M and Torremans PLC, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' CREATe Working Paper 2015/07

Feilzer MY, 'Doing Mixed Methods Research Pragmatically: Implications for the Rediscovery of Pragmatism as a Research Paradigm' (2010) 4(1) Journal of Mixed Methods Research 6

Giblin R, 'Evaluating Graduated Response' (2014) 37 Columbia Journal of Law and the Arts 147

– –, 'On the (New) New Zealand Graduated Response Law (and Why It's Unlikely to Achieve Its Aims)' (2012) 62(4) Telecommunications Journal of Australia 54.1

Grisse K and Koroch S, 'The British private copying exception' (2015) 10(7) JIPLP 562

Guellec D and Van Pottelsberghe B, 'From R&D to Productivity Growth: Do the Institutional Settings and the Source of Funds of R&D Matter?' (2004) CEB Working Paper No 04/010

Harnad S and others, 'The Access/Impact Problem and the Green and Gold Roads to Open Access' (2004) 30(4) Serials Review 310

Hauhart RC, 'The Origin and Development of the British and American Patent and Copyright Laws' (1983) 5 Whittier L Rev 539

Hedges LV, 'How Hard is Hard Science, How Soft is Soft Science?' (1987) 42(2) American Psychologist 443

Imbs J, 'The First Global Recession in Decades' (2010) 58 IMF Economic Review 327

Johnson RB and Onwuegbuzie, AJ, 'Mixed Methods Research: A Research Paradigm Whose Time Has Come' (2004) 33(7) Educational Researcher 14

Kozak M and Hartley J, 'Publication Fees for Open Access Journals: Different Disciplines—Different Methods' (2013) 64(12) Journal of the American Society for Information Science and Technology 2591

Laakso M and others, 'The Development of Open Access Journal Publishing from 1993 to 2009' (2011) 6(6) PLoS ONE e20961

Lacey B, 'Constructing Colum Cille' (2004) 21(3) Irish Arts Review 120

LaFrance M, 'Graduated Response by Industry Compact: Piercing the Black Box' (2012) 30 Cardozo Arts and Entertainment Law Journal 165

Landes W and Posner RA, 'An Economic Analysis of Copyright Law' (1989) 18(2) The Journal of Legal Studies 325

Latournerie A, 'Petite histoire des batailles du droit d'auteur' (2007) 5 Multitudes 37 (French)

Lawlor HJ, Armstrong ECR and Lindsay WM, 'The Cathach of St Columba' (1916/17) 33 Proceedings of the Royal Irish Academy Section C: Archaeology, Celtic Studies, History, Linguistics, Literature 241

Lemley MA, Levine DS and Post DG, 'Don't Break the Internet' (2012) 64 Stanford Law Review Online 34

Lenard M, 'On the Origin, Development and Demise of the Index Librorum Prohibitorum' (2006) 3(4) Journal of Access Services 59

Lucchi N, 'Access to Network Services and Protection of Constitutional Rights: Recognizing the Essential Role of Internet Access for the Freedom of Expression' (2007) 19 Cardozo Journal of International and Competition Law 645

Manyika J and others, 'Big data: The next frontier for innovation, competition, and productivity' (2011) McKinsey Global Institute

McAfee A and Brynjolfsson E, 'Big Data' (October 2012) Harvard Business Review 59

McCrudden C, 'Legal Research and the Social Sciences', (2006) 122 Law Quarterly Review 632

Mendel GN, 'To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity' (2011) 86 Notre Dame Law Review 1999

Mitra-Kahn BH, 'Copyright, Evidence and Lobbynomics: The World After the UK's Hargreaves Review' (2011) 8(2) Review of Economic Research on Copyright Issues 65

Netanel NW, 'Copyright and a Democratic Civil Society' (1996) 106 Yale Law Journal 283

O'Connell A, 'Copyright in Unpublished Works: 2039 and Orphan Works' (2015) 39(121) Library and Information Research Journal 41

Pallante M, 'The Next Great Copyright Act' (2013) 36(3) Columbia Journal of Law & the Arts 315

Pelanda B, 'Declarations of Cultural Independence: The Nationalistic Imperative Behind the Passage of Early American Copyright Laws, 1783-1787' (2011) 58 Journal of the Copyright Society of the USA 431

Peterson GM, 'Characteristics of Retracted Open Access Biomedical Literature: A Bibliographic Analysis' (2013) 64(12) Journal of the American Society for Information Science and Technology 2428

Peterson T and others, 'Open Access and the Author-Pays Problem' (2013) 1(3) Journal of Librarianship and Scholarly Communication 1

Phillips J, 'St Columba the Copyright Infringer' (1985) 12 EIPR 350

Plant A, 'The Economic Aspects of Copyright in Books' (1934) 1(2) Economica New Series 167

Posner RA, 'Intellectual property: the Law and Economics Approach' (2005) 19(2) Journal of Economic Perspectives 57

Robinson RV, 'Confederate Copyright Entries' (1936) 16(2) The William and Mary Quarterly, Second Series 248

Rosati E, '2015: the year of blocking injunctions?' (2015) 10(3) Journal of Intellectual Property Law & Practice 147

––, 'Copyright in the EU: in search of (in)flexibilities' (2014) 9(7) JIPLP 585

Seville C, 'Peter Pan's Rights: "To Die Will Be An Awfully Big Adventure" (2003) 51(1) Journal of the Copyright Society of the USA 1

––, 'The Statute of Anne: Rhetoric and Reception in the Nineteenth Century' (2010) 47(4) Houston Law Review 819

Shaver L, 'The Right to Science and Culture' (2010) 1 Wisconsin Law Review 121

Solomon DJ and Björk BC, 'Publication Fees in Open Access Publishing: Sources of Funding and Factors Influencing Choice of Journal' (2012) 63(1) Journal of the American Society for Information Science and Technology 98

––, Björk BC, 'A Study of Open Access Journals Using Article Processing Charges' (2012) 63(8) Journal of the American Society for Information Science and Technology 1485

Storer NW, 'The Hard Sciences and the Soft: Some Sociological Observations' (1967) 55(1) Bull Med Libr Assoc 75

Sudler H, 'Effectiveness of anti-piracy technology: Finding appropriate solutions for evolving online piracy' (2013) 56 Business Horizons 149

Svensson M and Larsson S, 'Intellectual property law in Europe: Illegal file sharing and the role of social norms' (2012) 14(7) New Media and Society 1147

Urban JM and Quilter L, 'Efficient Process or "Chilling Effects"? Takedown notices under section 512 of the Digital Millennium Copyright Act' (2006) 22 Santa Clara Computer and High Tech Law Journal 621

Weinberg BA, 'An Assessment of British Science Over the Twentieth Century' (2009) 119 The Economic Journal F252

White AA, 'The Juridical Structure Of Habitual Offender Laws And The Jurisprudence Of Authoritarian Social Control' (2006) 37(3) The University of Toledo Law Review 705

Yoo CS, 'Copyright and Public Good Economics: A Misunderstood Relation' (2007) 155(3) University of Pennsylvania Law Review 635

Zimmerman DL, 'Copyright as Incentives: Did We Just Imagine That?' (2011) 12 Theoretical Inquiries in Law 29

Press Releases

ACCAN, 'Copyright notice scheme must respect consumer protections' (Press Release, 20 February 2015)

Attorney-General for Australia, 'Online Copyright Infringement' (Press Release, 30 July 2014).

BPI, 'UK Creative Industries and ISPs partner in major new initiative to promote legal online entertainment' (Press Release, 19 July 2014)

Eircom, 'Introducing Eir: the changing face of Ireland's largest telecommunications company' (Press Release, 16 September 2015)

– –, 'Statement on Illegal File Sharing', Eircom (Press Release, 8 December 2010)

Minister for Culture and Communication (France), 'Publication du décret supprimant la peine complémentaire de la suspension d'accès à Internet' (Press Release, 9 July 2013) (French) <http://www.culturecommunication.gouv.fr/Presse/Communiques-de-presse/Publication-du-decret-supprimant-la-peine-complementaire-de-la-suspension-d-acces-a-Internet> accessed 22 December 2015

Netflix, 'Netflix to Announce Second-Quarter 2015 Financial Results' (Press Release, 12 June 2015)

Pirate Party UK, 'Impartiality Concerns Over London City Police' (Press Release, 31 March 2014)

Publishers Association, 'Publishers Win High Court Support in Fight Against Infringement' (Press Release, 26 May 2015)

Turnbull M, 'Collaboration to Tackle Online Copyright Infringement' (Press Release, 10 December 2014)

Virgin Media Ireland, 'UPC Confirms Plans to Become Virgin Media in Ireland' (Press Release, 28 August 2015)

– –, 'Virgin Media appoints Tony Hanway CEO of Ireland operations' (Press Release, 16 October 2015)

UK Government Documents

Department for Business, Innovation and Skills, 'Digital Britain: Final Report' (2009) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228844/7650.pdf> accessed 11 August 2016

– –, 'Government gives £150,000 funding to kick-start copyright hub' (Press Release, 25 March 2013).

– –, 'Government to open up publicly funded research' (Announcement, 16 July 2012) <https://www.gov.uk/government/news/government-to-open-up-publicly-funded-research> accessed 13 January 2016

– –, 'Growth Dashboard: 22 January 2015' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/396740/bis-15-4-growth-dashboard.pdf> accessed 11 November 2015

– –, 'Impact Assessment: Copyright Exception for Private Copying' (2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336306/2012-10-04-RPC11-BIS-1055_3__-Copyright_exception_for_Private_Copying.pdf> accessed 18 December 2015

Department for Culture, Media and Sport, 'Creative Industries Economic Estimates January 2014 Statistical Release' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271008/Creative_Industries_Economic_Estimates_-_January_2014.pdf> accessed 8 January 2016

– –, 'Creative Industries Economic Estimates' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/394668/Creative_Industries_Economic_Estimates_-_January_2015.pdf> accessed 11 January 2016

– –, 'Creative Industries Mapping Document', (2001) <https://www.gov.uk/government/publications/creative-industries-mapping-documents-2001> accessed 8 January 2016

– –, 'Creative Industries worth "8 million an hour to UK economy"' (Press Release, 14 January 2014)

– –, 'Creative Industries: Focus on Employment' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/324530/Creative_Industries_-_Focus_on_Employment.pdf> accessed 11 January 2016

Her Majesty's Government, 'Modernising Copyright: A modern, robust and flexible framework' (2011) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/response-2011-copyright-final.pdf> accessed 6 October 2015

– –, 'New education programme launched to combat online piracy' (Press Release, 19 July 2014)

– –, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (2011)

Her Majesty's Treasury, 'The Green Book: Appraisal and Evaluation in Central Government' (2011)

House of Commons Culture, Media and Sport Committee, 'Supporting the Creative Economy' (2013) <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcumeds/674/674.pdf> accessed 8 October 2015

IPO, 'Consultation on changes to penalties for online copyright infringement' (2015) <https://www.gov.uk/government/consultations/changes-to-penalties-for-online-copyright-infringement> accessed 13 January 2016

– –, 'Consultation on draft secondary legislation to regulate collecting societies' (2013) <https://www.gov.uk/government/consultations/draft-secondary-legislation-to-regulate-collecting-societies> accessed 13 January 2016

– –, 'Consultation on Reducing the Duration of Copyright in Certain Unpublished Works' (2014) <https://www.gov.uk/government/consultations/reducing-the-duration-of-copyright-in-certain-unpublished-works> accessed 13 January 2016

– –, 'Consultation on Section 72 Copyright, Designs and Patents Act 1988 (CDPA)' <https://www.gov.uk/government/consultations/section-72-copyright-designs-and-patents-act-1988-cdpa> accessed 13 January 2016

– –, 'Exceptions to Copyright: An Overview' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448269/Exceptions_to_copyright_-_An_Overview.pdf> accessed 23 November 2015

– –, 'Exceptions to Copyright: Research' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375954/Research.pdf> accessed 25 March 2015

– –, 'Government response to the consultation on reducing the duration of copyright in certain unpublished works' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/399171/973_-_Governement_Response_-_copyright_in_certain_unpublished_works.pdf> accessed 18 December 2015

– –, 'Guide to Evidence for Policy' (2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388238/consult-2011-copyright-evidence.pdf> accessed 14 January 2016

– –, 'Implementing the Hargreaves Review: Progress to Date' (2014) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/types/hargreaves.htm> accessed 21 December 2015

– –, 'International Comparison of Approaches to Online Copyright Infringement: Final Report' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404429/International_Comparison_of_Approaches_to_Online_Copyright_Infringement.pdf> accessed 14 January 2016

– –, 'IPO 2020: For Discussion: The IPO five year strategy' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/414941/IPO_5_year_strategy_discussion_document.pdf> accessed 18 December 2015

– –, 'Making life better by supporting UK creativity and innovation: The Intellectual Property Office's Five Year Strategy' (2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/493893/Corporate_5_year_strategy.pdf> accessed 28 January 2016

– –, 'Minimum Standards for UK Collecting Societies' (2012) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/hargreaves-minimumstandards.pdf> accessed 21 December 2015

– –, 'Orphan Works Licensing Scheme: Overview for Applicants' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368417/orphan-applicants.pdf> accessed 21 December 2015

– –, 'Orphan Works Register' <https://www.orphanworkslicensing.service.gov.uk/view-register> accessed 21 December 2015

– –, 'Progress of the exceptions to copyright regulation' (*Gov.uk,* 8 May 2014) <https://www.gov.uk/government/news/progress-of-the-exceptions-to-copyright-regulations> accessed 12 January 2016

– –, 'Review of Intellectual Property and Growth: Submissions Received' (2010) <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview/ipreview-c4e.htm> accessed 17 March 2015

– –, 'Secondary legislation for the regulation of collecting societies' (2014) <https://www.gov.uk/government/news/secondary-legislation-for-the-regulation-of-collecting-societies> accessed 13 October 2015

– –, 'Supporting document EE: Economic Impact of Recommendations' (2011) http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-doc-ee.pdf accessed 27 November 2014

– –, 'Supporting Innovation and Growth: a report on the work of the IPO 2013/14' (2014)

– –, 'UK consumers give boost to legal downloading and streaming for TV, films and music' (Press Release, 22 July 2015)

Web Articles

'Andy', '"Worst" File-Sharing Pirates Spend 300% More On Content than "Honest" Consumers' (*TorrentFreak,* May 10, 2013) <https://torrentfreak.com/0-more-on-content-than-honest-consumers-130510/> accessed 25 November 2015

'Ernesto', '"Six Strikes" anti-piracy scheme is a sham, filmmakers say' (*TorrentFreak,* 13 May 2015) <https://torrentfreak.com/six-strikes-anti-piracy-scheme-is-a-sham-filmmaker-say-150513/> accessed 22 December 2015

– –, '"Six Strikes" boosts demand for torrent VPNs and proxies' (*TorrentFreak,* 11 March 2013) <https://torrentfreak.com/six-strikes-boosts-demand-for-bittorrent-vpns-and-proxies-130311/> accessed 22 December 2015

– –, 'Six-Strikes fails to halt US Pirate Bay growth' (*TorrentFreak*, 3 September 2013) <https://torrentfreak.com/six-strikes-fails-to-halt-u-s-pirate-bay-growth-130903/> accessed 22 December 2015

– –, 'Top 10 Most Popular Torrent Sites of 2014' (*TorrentFreak*, January 4, 2014) <http://torrentfreak.com/top-10-popular-torrent-sites-2014-140104/> accessed 13 October 2015

– –, 'Top 10 Most Popular Torrent Sites of 2015' (*TorrentFreak*, January 4, 2015) <http://torrentfreak.com/top-10-popular-torrent-sites-2015-150104/> accessed 13 October 2015

Agnew E, 'Controversial Copyright (infringing file sharing) Amendment Bill passed into law' (*James & Wells*, 14 April 2011) <http://www.jaws.co.nz/about-us/media/article/controversial-copyright-infringing-file-sharing-amendment-bill-passed-into> accessed 22 December 2015

Anker C, 'Meeting the Infringement Challenge' (*BookBrunch*, 4 November 2015) <http://www.bookbrunch.co.uk/article_free.asp?pid=meeting_the_infringement_challenge> accessed 19 November 2015

Appleyard Lees, 'The Intellectual Property Enterprise Court – Quick and cost effective IP Litigation in the UK' (*Appleyardlees.com*) <http://www.appleyardlees.com/the-intellectual-property-enterprise-court-quick-and-cost-effective-ip-litigation-in-the-uk/> accessed 18 December 2015

Arnold BB, 'Eire' (*Barnold Law,* 29 October 2013) <http://barnoldlaw.blogspot.co.uk/2013/10/eire.html> accessed 15 December 2015

Ayris P, 'LIBER Argues For Pan-European TDM Exception' (*LIBER*, 23 February 2015) <http://libereurope.eu/blog/2015/02/23/liber-argues-for-pan-european-tdm-exception/> accessed 30 March 2015

Beall J, 'Science Magazine Conducts Sting Operation on OA Publishers' (*Scholarly Open Access,* 3 October 2013) <http://scholarlyoa.com/2013/10/03/science/> accessed 13 January 2013

Beesley A, 'Expert committee calls for establishment of copyright council' (*The Irish Times,* 29 October 2013) <http://www.irishtimes.com/news/ireland/irish-news/expert-committee-calls-for-establishment-of-copyright-council-1.1576122> accessed 15 December 2015

Borland J, 'RIAA settles with 12-year-old girl' (*CNet.com,* 10 September 2003) <http://www.cnet.com/uk/news/riaa-settles-with-12-year-old-girl/> accessed 14 January 2016

Bradwell P, 'Even more delays to the Digital Economy Act' (*Open Rights Group*, 4 February 2013) <https://www.openrightsgroup.org/blog/2013/even-more-delays-to-the-digital-economy-act> accessed 22 December 2015

Brennan D, 'iiNet's hollow victory over Hollywood' (*The Sydney Morning Herald*, February 25, 2011) <http://www.smh.com.au/federal-politics/society-and-culture/iinets-hollow-victory-over-hollywood-20110225-1b7qa.html> accessed 14 January 2016

Carolan M, 'Firms to continue "three strikes" rule against illegal music downloaders' (*The Irish Times,* 3 July 2013) <http://www.irishtimes.com/news/crime-and-law/firms-to-continue-three-strikes-rule-against-illegal-music-downloaders-1.1451820> accessed 22 December 2015

Challis B, 'Hadopi "failure" a warning for the UK?' (*The 1709 Blog,* 8 August 2012) <http://the1709blog.blogspot.com.br/2012/08/hadopi-failure-warning-for-uk.html> accessed 22 December 2015

– –, 'ISPs and content industries close to voluntary three strike scheme in the UK' (*The 1709 Blog,* 13 May 2014) <http://the1709blog.blogspot.co.uk/2014/05/isps-and-content-industries-close-to.html> accessed 22 December 2015

– –, 'The Owl, the CopyKat - and the Tiger: All at (C) in a beautiful EC boat' (*The 1709 Blog,* 6 February 2014) <http://the1709blog.blogspot.co.uk/2014/02/the-owl-copykat-and-tiger.html> accessed 21 December 2015

Collinson S, 'Explaining Australia's Fair Use Publishing Conundrum' (*Publishing Perspectives,* 26 February 2014) <http://publishingperspectives.com/2014/02/explaining-australias-fair-use-publishing-conundrum> accessed 12 January 2016

Connelly T, 'Creative Content UK launch new ad campaign highlighting the consequences of illegally downloading content' (*The Drum,* 23 October 2015) <http://www.thedrum.com/news/2015/10/23/creative-content-uk-launch-new-ad-campaign-highlighting-consequences-illegally> accessed 15 December 2015

Cox J, 'Online Pirates May Be Willing to Pay – If the Price is Right' (*The Conversation,* 13 September 2013) <https://theconversation.com/online-pirates-may-be-willing-to-pay-if-the-price-is-right-18167> accessed 25 November 2015

Curtis S, 'Illegal downloading: four strikes and then... nothing' (*The Telegraph,* 21 July 2014) <http://www.telegraph.co.uk/technology/news/10979918/Illegal-downloading-four-strikes-and-then...-nothing.html> accessed 22 December 2015

Dragland Å, 'Big Data, for better or worse' (*SINTEF,* 22 May 2013) <http://www.sintef.no/en/news/big-data--for-better-or-worse/> accessed 26 November 2015

Dredge S, 'Forget suing filesharers: in 2014, anti-piracy efforts follow the money' (*The Guardian,* 2 April 2014) <http://www.theguardian.com/technology/2014/apr/02/infringing-websites-list-anti-piracy> accessed 14 January 2016

– –, 'Spotify financial results show struggle to make streaming music viable' (*The Guardian,* 11 May 2015) <http://www.theguardian.com/technology/2015/may/11/spotify-financial-results-streaming-music-profitable> accessed 16 October 2015

Duffy R, 'Proposals on new online copyright laws presented to Government' (*TheJournal,* 29 October 2013) <http://www.thejournal.ie/online-copyright-1150856-Oct2013/> accessed 15 December 2015

Dworkin I, 'Fallout from John Bohannon's "Who's afraid of peer review"' (*Genes Gone Wild*, 14 October 2013) <http://genesgonewild.blogspot.co.uk/2013/10/fallout-from-john-bohannons-whos-afraid.html> accessed 13 January 2016

Eisen M, 'I confess, I wrote the Arsenic DNA paper to expose flaws in peer-review at subscription based journals' (*it is NOT junk*, 3 October 2013) <http://www.michaeleisen.org/blog/?p=1439> accessed 13 January 2016

Electronic Frontiers Foundation, 'Takedown Hall of Shame: News Agency With Dubious Copyright Claim Threatens Removal' (*Electronic Frontier Foundation*, 2011) <https://www.eff.org/takedowns/news-agency-dubious-copyright-claim-threatens-removal> accessed 16 December 2015

Ermert M, 'EU Copyright Review Divisive; French MEP Say UN Expert Lacks Balance' (*Intellectual Property Watch,* 7 May 2015) <http://www.ip-watch.org/2015/05/07/eu-copyright-review-divisive-french-mep-calls-un-expert-too-unbalanced/> accessed 13 January 2016

Esner J, 'Draft secondary legislation to regulate collecting societies laid in Parliament' (*The 1709 Blog,* 6 February 2014) <http://the1709blog.blogspot.co.uk/2014/02/draft-secondary-legislation-to-regulate.html> accessed 21 December 2015

Ferran B, 'Le bilan contrasté de l'action de l'Hadopi' (*Le Figaro*, 28 March 2012) (French) <http://www.lefigaro.fr/secteur/high-tech/2012/03/27/01007-20120327ARTFIG00670-le-bilan-contrastee-de-l-action-de-l-hadopi.php> accessed 22 December 2015

Firth J, 'Sources: No Digital Economy Act Copyright Warning Letters until 2016 at the Earliest' (*Slightly Right of Centre*, 30 May 2013) <http://www.sroc.eu/2013/05/sources-no-digital-economy-act.html?m=1> accessed 22 December 2015

Flanagan P, 'Copyright law to embrace digital age' (*The Irish Independent,* 29 October 2013) <http://www.independent.ie/irish-news/copyright-law-to-embrace-digital-age-29707320.html> accessed 15 December 2015> accessed 20 November 2015

Fox B, 'MEPs back pan-EU music licence deal' (*euobserver,* 5 February 2014) <http://euobserver.com/news/123011> accessed 21 December 2015

Freeman M,' Ireland's 'SOPA' Legislation: The big arguments for and against' (*TheJournal.ie,* 26 January 2012) <http://www.thejournal.ie/ireland%e2%80%99s-%e2%80%98sopa%e2%80%99-legislation-the-big-arguments-for-and-against-336952-Jan2012/> accessed 14 January 2016

Gallagher DF, 'New Economy; A copyright dispute with the Church of Scientology is forcing Google to do some creative linking' (*The New York Times,* 22 April 2002) <http://www.nytimes.com/2002/04/22/business/new-economy-copyright-dispute-with-church-scientology-forcing-google-some.html?src=pm&_r=0> accessed 16 December 2015

Geigner T, 'Come See How Excited Everyone Is For The Latest UK Educational "Don't Pirate" Campaign' (*Techdirt,* 16 July 2015) <https://www.techdirt.com/articles/20150715/10465831650/come-see-how-excited-everyone-is-latest-uk-educational-dont-pirate-campaign.shtml> accessed 22 December 2015

Geist M, 'Rightscorp and BMG Exploiting Copyright Notice-and-Notice System: Citing False Legal Information in Payment Demands' (*Michael Geist,* 8 January 2015) <http://www.michaelgeist.ca/2015/01/rightscorp-bmg-exploiting-copyright-notice-notice-system-citing-false-legal-information-payment-demands/> accessed 22 December 2015

– –, 'The Copyright Notice Flood: What to Consider If You Receive a Copyright Infringement Notification' (*Michael Geist,* 13 April 2015) <http://www.michaelgeist.ca/2015/04/the-copyright-notice-flood-what-to-consider-if-you-receive-a-copyright-infringement-notification/> accessed 22 December 2015

– –, 'Why the TPP is a Canadian Digital Policy Failure' (*MichaelGeist.ca*, 18 November 2015) <http://www.michaelgeist.ca/2015/11/why-the-tpp-is-a-canadian-digital-policy-failure/> accessed 23 November 2015

Halliday J, 'Intellectual property crime unit to be set up by City police' (*The Guardian*, 17 December 2012) <http://www.theguardian.com/technology/2012/dec/17/intellectual-property-crime-unit> accessed 18 December 2015

Hamilton J, 'Can a Cancer Drug Reverse Parkinson's Disease and Dementia?' (*NPR.org*, 20 October 2015) <http://www.npr.org/sections/health-shots/2015/10/17/448323916/can-a-cancer-drug-reverse-parkinsons-disease-and-dementia> accessed 26 November 2015

Hargreaves I, 'MPs Have Missed the Mark in Copyright Reform', (*The Conversation*, 30 September 2013) <https://theconversation.com/mps-have-missed-the-mark-in-attacking-copyright-reform-18703> accessed 18 January 2016

Harnad S, 'Subversive Proposal' (*bit.listserv.vpiej-l*, 28 June 1994) <https://groups.google.com/forum/?hl=en#!topic/bit.listserv.vpiej-l/BoKENhK0_00> accessed 13 January 2016

Haynes M, 'Canadians have "no obligation" to US piracy firm' (*Toronto Metro,* 22 April 2015) <http://metronews.ca/news/canada/1348052/canadians-under-no-obligation-to-pay-for-piracy/> accessed 22 December 2015

Healy T, 'Internet firms ordered to block file-share sites' (*The Irish Independent,* 3 December 2013) <http://www.independent.ie/irish-news/courts/internet-firms-ordered-to-block-fileshare-sites-29803417.html> accessed 14 January 2016

'Hirst N, 'Barnier forced to delay copyright roadmap' (*European Voice,* 16 July 2014) <http://www.politico.eu/article/barnier-forced-to-delay-copyright-roadmap/> accessed 11 January 2016

Horten M, 'Hadopi – has it massaged the numbers?' (*IPTegrity.com*, 30 March 2012) <http://www.iptegrity.com/index.php/france/755-hadopi-has-it-massaged-the-numbers> accessed 22 December 2015

Humphries C and Kane C, 'Telefonica sells O2 Ireland to Hutchinson's 3 for $1billion' (*Reuters*, 24 June 2013) <http://uk.reuters.com/article/2013/06/24/uk-telfonica-ireland-idUKBRE95N05N20130624> accessed 14 January 2016

Irish Times, 'UPC ordered to take action against illegal downloaders' (*The Irish Times*, 27 March 2015) <http://www.irishtimes.com/news/crime-and-law/courts/high-court/upc-ordered-to-take-action-against-illegal-downloaders-1.2156346> accessed 18 January 2016

Jackson M, 'UK ISPs and Rights Holders to Begin Anti-Piracy Campaign' (*ISPreview,* 15 July 2015) <http://www.ispreview.co.uk/index.php/2015/07/uk-isps-and-copyright-holders-begin-internet-anti-piracy-campaign.html> accessed 22 December 2015

Kastrenekes J, 'The iPad's 5th anniversary: a timeline of Apple's category-defining tablet' (*The Verge,* 3 April 2015) <http://www.theverge.com/2015/4/3/8339599/apple-ipad-five-years-old-timeline-photos-videos> accessed 16 December 2015

Kitson N, Why 'Ireland's SOPA' could be a good thing' (*rte.ie*, 27 January 2012) <http://www.rte.ie/news/business/technology/2012/0127/311599-sopa/> accessed 14 January 2016

Laird É, 'Note of Minister Sherlock's meeting with the Irish Recorded Music Association on Monday 5th December 2011' (*Scribd,* Dec 7, 2011) <www.scribd.com/doc/83984745/EMI-Briefing-001> accessed 22 December 2015

Lamont T, 'Napster: The Day Music Was Set Free' (*The Guardian*, 24 February 2013) <http://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing> accessed 15 December 2015

Latif L, 'French ISPs will be flooded by IP address information requests' (*The Inquirer,* 22 September 2010) <http://www.theinquirer.net/inquirer/news/1734781/french-isps-flooded-ip-address-information-requests> accessed 15 December 2015

Lee D, 'Deal to combat piracy in UK with "alerts" is imminent' (*BBC News,* 9 May 2014) <http://www.bbc.co.uk/news/technology-27330150> accessed 22 December 2015

Lesser J, 'Copyright Alert System Set to Begin' (*Center for Copyright Information*, 25 February 2013) <http://www.copyrightinformation.org/uncategorized/copyright-alert-system-set-to-begin> accessed 22 December 2015

– –, 'Early Reports: CAS Moving Forward' (*Center for Copyright Information)* <http://www.copyrightinformation.org/uncategorized/early-reports-cas-moving-forward/> accessed 22 December 2015

LIBER, 'European Commission Thinks Again on Copyright White Paper' (*LIBER,* 23 July 2014) <http://libereurope.eu/blog/2014/07/23/european-commission-thinks-again-on-copyright-white-paper> accessed 11 January 2016

Lillington K, 'Dancing Baby can lead the way on Irish Copyright law' (*The Irish Times* 17 September 2015) <http://www.irishtimes.com/business/technology/dancing-baby-can-lead-the-way-on-irish-copyright-law-1.2354251> accessed 17 November 2015

Lumen Team, 'Chilling Effects Announces New Name, International Partnerships' (*Lumen Blog,* 2 November 2015) <https://lumendatabase.org/blog_entries/763> accessed 16 December 2015

Lungu A, 'Ep 3: Early Copyright History' (*copy-me.org*, 13 October 2014) <http://copy-me.org/2014/10/copy-me-webseries-early-copyright-history-episode-3/> accessed 17 November 2015

Macintyre TJ, 'Everything you need to know about Ireland's SOPA' (*TheJournal.ie*, 24 January 2012) <http://www.thejournal.ie/readme/reader-irelands-sopa-a-faq/> accessed 14 January 2016

– –, 'The law should be predictable as to what is mandated and what is forbidden' (*IT Law in Ireland*, 5 February 2012) <http://www.tjmcintyre.com/2012/02/law-should-be-predictable.html> accessed 14 January 2016

Mance H, 'Book Publishers Win Landmark Case Against eBook Pirates' (*Financial Times*, 26 May 2015) <http://www.ft.com/cms/s/0/988850e0-038c-11e5-a70f-00144feabdc0.html#axzz3bG2vyKuv> accessed 24 July 2015

Manenti B, 'Aurélie Filippetti: "Je vais réduire les crédits de l'Hadopi"' (*O,* 1 August 2012) (French) <http://obsession.nouvelobs.com/high-tech/20120801.OBS8587/aurelie-filippetti-je-vais-reduire-les-credits-de-l-hadopi.html> accessed 22 December 2015

Marchive V, 'Three years and millions of euros later, Hadopi has its first conviction. Now what?' (*ZDNet,* 30 October 2012) <http://www.zdnet.com/three-years-and-millions-of-euros-later-hadopi-has-its-first-conviction-now-what-7000006612/> accessed 22 December 2015

Marr B, 'Big Data: 20 Mind-Boggling Facts Everyone Must Read' (*Forbes,* 30 September 2015) <http://www.forbes.com/sites/bernardmarr/2015/09/30/big-data-20-mind-boggling-facts-everyone-must-read/> accessed 18 December 2015

Martinez-Arias Lab, 'On prepub servers and DORA, a glimpse of a future that is upon us' (*Martinez-Ariaz Lab Department of Genetics,* 7 October 2013) <http://amapress.gen.cam.ac.uk/?p=1239> accessed 13 January 2016

Masnick M, 'District Court: $675,000 For Non-commercially Sharing 30 Songs Is Perfectly Reasonable' (*TechDirt,* 24 August 2012) <https://www.techdirt.com/articles/20120823/16473120140/district-court-675000-non-commercially-sharing-30-songs-is-perfectly-reasonable.shtml> accessed 14 January 2016

Meale D, '500 and Counting: websites blocked by order of UK courts' (*The IPKat,* 29 July 2015) <http://ipkitten.blogspot.co.uk/2015/07/500-and-counting-websites-blocked-by.html> accessed 19 December 2015

– –, 'Access Blocked! List of UK ISP blocking injunctions' (*eLexica,* 20 July 2015) <http://www.elexica.com/en/legal-topics/intellectual-property/29-access-blocked> accessed 14 January 2016

– –, 'BPI, MPA and ISPs go VCAP against P2P while DEA is still MIA' (*The IPKat,* 16 May 2014) <http://ipkitten.blogspot.co.uk/2014/05/bpi-mpa-and-isps-go-vcap-against-p2p.html> accessed 22 December 2015

Mortimer N, 'Creative Content UK appoints Weber Shandwick to deliver education campaign' (*The Drum,* 15 July 2015) <http://www.thedrum.com/news/2015/07/15/creative-content-uk-appoints-weber-shandwick-deliver-education-campaign> accessed 22 December 2015

Mulley D, 'Link Without Fear – Copyright in Ireland in a Digital Age' (*Damien Mulley,* 29 October 2013) <http://www.mulley.net/2013/10/29/link-without-fear-copyright-in-ireland-in-a-digital-age/> accessed 15 December 2015

Murray-Rust P, 'Content Mining: Why you and I should NOT sign up for Elsevier's TDM service' (*PeterMR's Blog*, 31 January 2014) <http://blogs.ch.cam.ac.uk/pmr/2014/01/31/content-mining-why-you-and-i-should-not-sign-up-for-elseviers-tdm-service/> accessed 17 March 2015

Ó Muinnecháin C, 'Copyright Report Proposes Major Overhaul of Irish Law' (*Technology.ie,* 29 October 2013) <http://technology.ie/copyright-report-proposes-major-overhaul-irish-law/> accessed 15 December 2015

O'Dell E, 'Modernising Copyright: The Report of the Copyright Review Committee #CRC13' (*Cearta.ie,* 29 October 2013) <http://www.cearta.ie/2013/10/modernising-copyright-the-report-of-the-copyright-review-committee/> accessed 15 December 2015

– –, 'The present of copyright – where are we now with copyright reform?' (*Cearta.ie,* 23 November 2015) <http://www.cearta.ie/2015/11/the-present-of-copyright-where-are-we-now-with-copyright-reform/> accessed 25 November 2015

Oswald E, 'Is a $675,000 fine for sharing 31 pirated songs too much?' (*ExtremeTech,* 24 August 2012) <http://www.extremetech.com/internet/134992-is-a-675000-fine-for-sharing-31-pirated-songs-too-much> accessed 14 January 2016

Pakinkis T, 'Police IP Crime Unit launches Infringing Website List for advertisers' (*Music Week,* 31 March 2014) <http://www.musicweek.com/news/read/police-ip-crime-unit-launches-infringing-website-list/058069> accessed 14 December 2016

– –, 'PRS, STIM and GEMA launch licensing hub for Europe' (*MusicWeek,* 20 July 2015) <http://www.musicweek.com/news/read/prs-stim-and-gema-launch-licensing-hub-for-europe/062333> accessed 21 December 2015

Pearce R, 'Should the copyright notice scheme be scrapped?' (*ComputerWorld,* 8 September 2015) <http://computerworld.com.au/article/584018/should-copyright-notice-scheme-scrapped/> accessed 22 December 2015

Peoples G, 'Copyright Review Concludes with Final Hearing, Ball Passes to Congress' (*Billboard,* 29 April 2015) <http://www.billboard.com/articles/business/6546372/copyright-review-concludes-with-final-hearing-ball-passes-to-congress> accessed 8 October 2015

Pfanner E, 'France approves wide crackdown on net piracy' (*The New York Times,* 22 October 2009) <http://www.nytimes.com/2009/10/23/technology/23net.html?_r=0> accessed 15 December 2015

Phillips J, 'A fable for modern times: the Fox and the Newzbin' (*The IPKat,* 29 March 2010) <http://ipkitten.blogspot.co.uk/2010/03/fable-for-modern-times-fox-and-newzbin.html> accessed 16 December 2015

– –, 'Modernising Copyright: The Irish Plan' (*The 1709 Blog,* 29 October 2013) <http://the1709blog.blogspot.ie/2013/10/modernising-copyright-irish-plan.html> accessed 15 December 2015

Pinsent Mason, 'UK government scraps plans to legalise private copying' (*Out-Law.com,* 18 November 2015) <http://www.out-law.com/en/articles/2015/november/uk-government-scraps-plans-to-legalise-private-copying/> accessed 18 December 2015

PIPCU, 'Commander Head welcomes Mike Weatherley's MP latest report on tackling advertising revenue from illegal websites' (*City of London Police*, 18 November 2014) <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/Pages/tackling-advertising-revenue-.aspx> accessed 14 January 2016

– –, 'Operation Creative and IWL' (*City of London Police)* <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Operation-creative.aspx> accessed 13 January 2016

– –, 'Operation Creative sees 73 per cent drop in top UK advertising on illegal sites' (*City of London Police,* 12 August 2015) <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/Pages/Operation-Creative-sees-73-per-cent-drop-in-top-UK-advertising-on-illegal-sites.aspx> accessed 14 January 2016

– –, 'PIPCU funding confirmed until 2017 - Commander Head "This is fantastic news for the City of London Police"' (*City of London Police*, 18 November 2014) <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/pipcu-news/Pages/pipcu-funding-confirmed-until-2017.aspx> accessed 13 January 2016

Poynder R, 'The Finch Report and its implications for the developing world' (*Open and Shut?*, 18 July 2012) <http://poynder.blogspot.co.uk/2012/07/the-finch-report-and-its-implications.html> accessed 13 January 2016

PR Newswire, 'Six Strikes And You're (Not Even Close To) Out; Internet Security Task Force Calls for End of Copyright Alert System' (*PR Newswire,* 12 May 2015) <http://www.prnewswire.com/news-releases/six-strikes-and-youre-not-even-close-to-out-internet-security-task-force-calls-for-end-of-copyright-alert-system-300082007.html> accessed 22 December 2015

Publishers Licensing Society, 'Survey shows text and data mining supported by licensing not copyright exceptions' (*PLS News and Events*, August 2015) <http://www.pls.org.uk/news-events/n-tdm-august-15/> accessed 18 October 2015

Reda J, 'Reda Report Explained' (2015) (*JuliaReda)* <https://pub.juliareda.eu/copyright_evaluation_report-explained.pdf> accessed 13 January 2016

Redhead C, 'OASPA's response to the recent article in Science entitled "Who's Afraid of Peer Review?"' (*OASPA*, 4 October 2013) <http://oaspa.org/response-to-the-recent-article-in-science/> accessed 13 January 2016

Rees M, 'Hadopi : 600 € d'amende et quinze jours de suspension pour un abonné' (*NextInpact*, 12 June 2013) (French) <http://www.nextinpact.com/news/80487-hadopi-600-d-amende-et-quinze-jours-suspension-pour-abonne.htm> accessed 22 December 2015

Reilly G, 'High Court orders six Irish internet providers to block The Pirate Bay' (*TheJournal.ie,* 12 June 2013) <http://www.thejournal.ie/high-court-order-block-pirate-bay-948503-Jun2013/> accessed 14 January 2016

Rice C, 'Open access publishing hoax: what Science magazine got wrong' (*The Guardian,* 4 October 2013) <http://www.theguardian.com/higher-education-network/blog/2013/oct/04/science-hoax-peer-review-open-access> accessed 13 January 2016

Roger P and Chastand JB, 'Hadopi: le Conseil constitutionnel censure la riposte graduée' (*Le Monde,* 10 June 2009) (French) <http://www.lemonde.fr/technologies/article/2009/06/10/hadopi-le-conseil-constitutionnel-censure-la-riposte-graduee_1205290_651865.html> accessed 22 December 2015

Rosati E, 'Blocking orders across Europe: personality disorder or are the Swedes right?' (*The IPKat,* 1 December 2015) <http://ipkitten.blogspot.co.uk/2015/12/blocking-orders-across-europe.html> accessed 1 December 2015

– –, 'BREAKING: Do not expect to read the EU copyright White Paper while on your summer holiday' (*The IPKat,* 17 July 2014) <http://ipkitten.blogspot.it/2014/07/breaking-do-not-expect-to-read-eu.html> accessed 11 January 2016

– –, 'BREAKING: EU Commission unveils next steps for copyright reform, including draft content portability regulation' (*The IPKat,* 9 December 2015) <http://ipkitten.blogspot.co.uk/2015/12/breaking-eu-commission-unveils-next.html> accessed 14 December 2015

– –, 'Early thoughts on Svensson: communication/making available, "new" public, altering the scope of exclusive rights' (*The IPKat,* 13 February 2014) <http://ipkitten.blogspot.co.uk/2014/02/early-thoughts-on-svensson.html> accessed 21 December 2015

– –, 'EU Parliament adopts Collective Rights Management Directive' (*The IPKat,* 6 February 2014) <http://ipkitten.blogspot.co.uk/2014/02/eu-parliament-adopts-collective-rights.html> accessed 21 December 2015

––, 'EU Parliament rejects restrictions on freedom of panorama and ancillary right over news content' (*The IPKat*, 9 July 2015) <http://ipkitten.blogspot.co.uk/2015/07/eu-parliament-rejects-restrictions-on.html> accessed 18 December 2015

––, 'SUPER KAT-EXCLUSIVE: here's Commission's draft White Paper on EU copyright' (*The IPKat,* 23 June 2014) <http://ipkitten.blogspot.co.uk/2014/06/super-kat-exclusive-heres-commissions.html> accessed 11 January 2016

Rosenblatt B, 'The Future of HADOPI' (*Copyright and Technology*, 26 October 2012) <http://copyrightandtechnology.com/2012/10/26/the-future-of-hadopi/> accessed 22 December 2015

Royal Irish Academy, 'The Cathach/The Psalter of St Columba' (*Royal Irish Academy)* <https://www.ria.ie/library/catalogues/special-collections/medieval-and-early-modern-manuscripts/cathach-psalter-st> accessed 21 December 2015

RT, 'UK internet firms to adopt new "anti-piracy" strategy' (*RT,* 22 July 2014) <http://www.rt.com/uk/174744-uk-internet-fileshare-piracy/> accessed 22 December 2015

Schmidt BH, 'Gendered Language in Teacher Reviews' (*benschmidt.org,* 2015) <http://benschmidt.org/profGender> accessed 17 November 2015

Schweizer M, 'BGH on blocking injunctions: first go after the source' (*The IPKat,* 30 November 2015) <http://ipkitten.blogspot.co.uk/2015/11/bgh-on-blocking-injunctions-first-go.html> accessed 1 December 2015

Shankland S, 'French three-strikes law no longer suspends Net access' (*CNet.com*, 10 July 2013) <http://www.cnet.com/news/french-three-strikes-law-no-longer-suspends-net-access/> accessed 15 December 2015

Sharples A, 'The Hargreaves Review: Destinations without Routes' (*eIP*, 2011) <http://www.eip.com/uk/updates/article/the_hargreaves_review_destinations_without_routes> accessed 6 October 2015

Sharwood S, 'Australian ISPs agree to three-strikes-plus-court-order anti-piracy plan' (*The Register,* 20 February 2015) <http://www.theregister.co.uk/2015/02/20/australian_isps_agree_to_threestrikespluscourtorder_antipiracy_plan/> accessed 22 December 2015

Shillum C, 'Elsevier updates text-mining policy to improve access for researchers' (*Elsevier*, 31 January 2014) <http://www.elsevier.com/connect/elsevier-updates-text-mining-policy-to-improve-access-for-researchers> accessed 12 March 2015

Sigler MG, 'Eric Schmidt: Every 2 Days We Create as Much Information as We Did Up To 2003' (*Techrunch.com*, 4 August 2010) <http://techcrunch.com/2010/08/04/schmidt-data/> accessed 26 November 2015

Stallman R, 'Why Open Source misses the point of Free Software' (*GNU Operating System website*) <http://www.gnu.org/philosophy/open-source-misses-the-point.html> accessed 13 January 2016

Storrier A, 'Graduated response in Australia: what does the draft code of practice say?' (*The IPKat,* 21 February 2015) <http://ipkitten.blogspot.co.uk/2015/02/graduated-response-in-australia-what.html> accessed 22 December 2015

Suber P, 'Gratis and libre Open Access' (*Sparc*, 2008) <http://sparcopen.org/our-work/gratis-and-libre-open-access/> accessed 18 January 2016

Suehle R, 'The Story of St Columba: A modern copyright battle in sixth century Ireland' (*OpenSource.com,* 9 June 2011) <http://opensource.com/law/11/6/story-st-columba-modern-copyright-battle-sixth-century-ireland> accessed 21 December 2015

Teytelman L, 'What Hurts Science – rejection of good or acceptance of bad?' (*PubChase,* 4 October 2013) <http://blog.pubchase.com/what-hurts-science-rejection-of-good-or-acceptance-of-bad/> accessed 13 January 2016

Tribe LH, 'The "Stop Online Piracy Act" (SOPA) violates the first amendment' (*Scribd*, December 6, 2011) <http://www.scribd.com/doc/75153093/Tribe-Legis-Memo-on-SOPA-12-6-11-1> accessed 10 August 2015

Wagner K, 'The History of Amazon's Kindle So Far' (*Gizmodo,* 28 September 2011) <http://gizmodo.com/5844662/the-history-of-amazons-kindle-so-far/> accessed 16 December 2015

Walker J, 'North America has now run out of IPv4 Internet addresses' (*Digital Journal,* 2 July 2015) <http://www.digitaljournal.com/internet/north-america-has-now-run-out-of-ipv4-internet-addresses/article/437297#hv15558> accessed 22 December 2015

Wikipedia, 'Copyright' (*Wikipedia)* <https://en.wikipedia.org/wiki/Wikipedia:Copyrights> accessed 11 November 2015

Williamson C, 'PRS for Music, STIM, GEMA combine for pan-European hub' (*Music Week,* 16 June 2015) <http://www.musicweek.com/news/read/prs-for-music-stim-gema-combine/062067> accessed 21 December 2015

Wortham J, 'Public Outcry over Antipiracy Bills Began as Grass-Roots Grumbling' (*The New York Times,* 19 January 2012) <http://www.nytimes.com/2012/01/20/technology/public-outcry-over-antipiracy-bills-began-as-grass-roots-grumbling.html?pagewanted=1&ref=technology&_r=0> accessed 10 August 2015

– –, 'With Twitter, Blackouts and Demonstrations, Web Flexes Its Muscle' (*The New York Times,* 18 January 2012) <http://www.nytimes.com/2012/01/19/technology/protests-of-antipiracy-bills-unite-web.html?ref=technology&_r=0> accessed 10 August 2015

Wreckler A, 'Reality Bytes: Ten-point guide to 'Irish SOPA' row' (*The Daily Business Post,* 29 January 2012) <http://www.businesspost.ie/reality-bytes-ten-point-guide-to-irish-sopa-row/> accessed 14 January 2016

WTO, 'Responding to least developed countries' special needs in intellectual property' (*WTO.org,* 16 October 2013) <https://www.wto.org/english/tratop_e/trips_e/ldc_e.htm> accessed 15 December 2015

ZDNet, 'Hadopi : première suspension de connexion Internet infligée à un internaute' (*ZDNet*, 12 June 2013) (French) <http://www.zdnet.fr/actualites/hadopi-premiere-suspension-de-connexion-internet-infligee-a-un-internaute-39791358.htm> accessed 22 December 2015

Zillman C, 'Parkinson's Patients Show Improvement After Taking Cancer Drug' (*Fortune,* 19 October 2015) <http://fortune.com/2015/10/19/cancer-drug-parkinsons/> accessed 26 November 2015

Web Pages

– –, 'About the REF' (*REF.ac.uk)* <http://www.ref.ac.uk/about/>accessed 11 June 2015

– –, 'About' (*Free Software Foundation*) <http://www.fsf.org/about> accessed 12 November 2015

– –, 'About' (*Creative Commons)* <http://creativecommons.org/about> accessed 18 December 2015

– –, 'Copyright and Enforcement Director, IPO' (*gov.uk*) <https://www.gov.uk/government/people/ros-lynch> accessed 18 December 2015

– –, 'GNU General Public Licence' (*GNU Operating System website*) <https://www.gnu.org/copyleft/gpl.html> accessed 12 November 2015

– –, 'OA journal business models' (*Open Access Directory*) <http://oad.simmons.edu/oadwiki/OA_journal_business_models> accessed 18 December 2015

– –, 'What is Copyleft?' (*GNU Operating System website*) <https://www.gnu.org/copyleft/> accessed 12 November 2015

Attorney-General's Department (Australia), 'Online Copyright Infringement Submissions' <http://www.ag.gov.au/Consultations/Pages/OnlineCopyrightInfringement-Submissions.aspx> [defunct]

Australian Law Reform Commission, 'Copyright and the digital economy' (*Australian Law Reform Commission,* 30 May 2012) <http://www.alrc.gov.au/inquiries/copyright-and-digital-economy> accessed 14 December 2015

Beall J, 'Beall's List: Potential, possible, or probable predatory scholarly open-access publishers' (*Scholarly Open Access*) <http://scholarlyoa.com/publishers/> accessed 18 December 2015

– –, 'Criteria for Determining Predatory Open-Access Publishers (2nd edition)' (*Scholarly Open Access,* 1 December 2012) <http://scholarlyoa.com/2012/11/30/criteria-for-determining-predatory-open-access-publishers-2nd-edition/> accessed 18 December 2015

– –, 'Criteria for Determining Predatory Open-Access Publishers (3rd edition)' (*Scholarly Open Access,* 1 January 2015) <https://scholarlyoa.files.wordpress.com/2015/01/criteria-2015.pdf> accessed 13 January 2016

– –, 'List of Standalone Journals' (*Scholarly Open Access)* <http://scholarlyoa.com/individual-journals/> accessed 13 January 2016

Center for Copyright Information, 'The Copyright Alert System' (*Center for Copyright Information)* <http://www.copyrightinformation.org/the-copyright-alert-system/> accessed 18 December 2015

Cham J, 'What is Open Access?' (webcomic) (*PhD Comics*, 24 October 2010) <http://www.phdcomics.com/comics.php?f=1533> accessed 13 January 2016

City Police PIPCU (@citypolicePIPCU) (Tweet, 28 July 2015) '#DidYouKnow? Since #PIPCU launched, the team has disrupted more than 6,000 illegal sites selling #fake goods! Great stat for #TechTuesday!' <https://twitter.com/citypolicepipcu/status/625999038316474368> accessed 13 January 2016

CLA, 'Copyright Information' (*CLA.co.uk*) <http://www.cla.co.uk/copyright_information/copyright_information> accessed 21 December 2015

– –, 'Licence Plus Explained' (2015) <http://www.cla.co.uk/data/pdfs/licence_plus/licence-plus.pdf> accessed 18 December 2015

Commission on Intellectual Property Rights, 'Welcome' (*Website of the IP Commission*) <http://www.iprcommission.org/home.html> accessed 14 December 2015

CrossRef, 'Text and Data Mining for Researchers' (*CrossRef*) <http://tdmsupport.crossref.org/researchers/> accessed 17 March 2015

Department of Jobs, Enterprise and Innovation, 'Copyright' (*Department of Jobs, Enterprise and Innovation*) <https://www.djei.ie/en/What-We-Do/Research-Innovation/Intellectual-Property/Copyright/> accessed 24 November 2015

Doctorow C, 'About *Little Brother*' <http://craphound.com/littlebrother/about/#freedownload/> accessed 18 December 2015

– –, 'Download *Little Brother* for free' (*Craphound*) <http://craphound.com/littlebrother/download/> accessed 18 December 2015

Eircom, 'Legal Music' (*Eir.ie*, 2012) <https://www.eir.ie/notification/legalmusic/faqs/> accessed 22 December 2015

Eurostat, 'Glossary: Statistical classification of economic activities in the European Community (NACE)' (*Eurostat: Statistics Explained*) <http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Statistical_classification_of_economic_activities_in_the_European_Community_(NACE)> accessed 17 December 2015

Flickr, 'Creative Commons' (*Flickr*) <https://www.flickr.com/creativecommons/> accessed 11 November 2015

Government of Canada, 'Notice and Notice Regime' (2014) (*Government of Canada*) <http://news.gc.ca/web/article-en.do?nid=858069> accessed 22 December 2015

Hadopi, 'Actualités [News]' (*Hadopi.fr*) (French) <http://www.hadopi.fr/en/actualites.html> accessed 22 December 2015

– –, 'Resources' (*Hadopi.fr*) <http://www.hadopi.fr/en/resources> accessed 22 December 2015

Inman M, 'I tried to watch Game of Thrones and this is what happened' (webcomic) (*The Oatmeal*) <http://theoatmeal.com/comics/game_of_thrones> accessed 18 December 2015

International Intellectual Property Alliance, 'About' (*IIPA.com)* <http://www.iipa.com/aboutiipa.html> accessed 22 December 2015

Licences for Europe, 'About' (*Licences for Europe*) <http://ec.europa.eu/licences-for-europe-dialogue/en> accessed 21 December 2015

– –, 'Final Plenary Meeting' (*Licences for Europe)* <http://ec.europa.eu/licences-for-europe-dialogue/en/content/final-plenary-meeting> accessed 21 December 2015

Ministry for Culture and Heritage, 'Cultural sector overviews' (Ministry for Culture and Heritage, 18 October 2013) <http://www.mch.govt.nz/what-we-do/cultural-sector-overviews> accessed 22 December 2015

Ministry of Justice, '2013 decisions' (*Copyright Tribunal*) <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions-1/2013-decisions> accessed 22 December 2015

– –, '2014 decisions' (*Copyright Tribunal*) <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions-1/2014-decisions> accessed 22 December 2015

– –, '2015 Decisions' (*Copyright Tribunal*) <http://www.justice.govt.nz/tribunals/copyright-tribunal/decisions-1/2015-decisions> accessed 1 July 2015

NLA Media Access, 'Newspaper Websites – Copyright Law' (2014) <http://www.nlamediaaccess.com/uploads/public/News/Summary%20of%20Legal%20Proceedings%20-%20Background%20for%20Journalists%20_June_2014.pdf>accessed 12 January 2016

Office of Consumer Affairs (Canada), 'Notice and Notice Regime: Quick Facts' (*Industry Canada*) <http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02920.html> accessed 22 December 2015

Office of the Minister for Commerce (NZ), 'Delayed Review of the Copyright Act 1994' (2013) <http://www.mbie.govt.nz/info-services/business/intellectual-property/copyright/documents-and-images/cabinet-paper-delayed-review-copyright-act-1994.pdf> accessed 22 December 2012

Office of the US Trade Representative, 'The Trans-Pacific Partnership' <https://ustr.gov/tpp/> accessed 19 December 2015

Oxford English Dictionary, 'Fit, adj' (OED Online, *OUP* June 2016) <http://www.oed.com/view/Entry/70747?redirectedFrom=fit+for+purpose#eid130154137> accessed 27 June 2016

PIPCU, 'About PIPCU' (*City of London Police)* <https://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/About-PIPCU.aspx> accessed 13 January 2016

Publishers Association, 'What does the CIP do?' (*The Publishers Association)* <http://www.publishers.org.uk/services-and-statistics/copyright-infringement-portal/what-does-the-cip-do/> accessed 14 January 2016

RTÉ, 'Prime Time' (26 January 2012) <http://www.rte.ie/news/player/2012/1112/3180372-prime-time-copyright-law-changes-and-sopa/> accessed 14 January 2016

Seán Sherlock TD (@seansherlocktd) (Tweet, 24 January 2012) 'There is no intention by the government to introduce legislation to block access to the Internet or sites. I have state [sic] that unambiguously.' <https://twitter.com/seansherlocktd/statuses/161600885435281409> accessed 13 January 2016

Sky, 'Websites we've blocked under order of the High Court' (*Sky.com)* <http://help.sky.com/articles/websites-blocked-under-order-of-the-high-court> accessed 15 July 2015

TalkTalk, 'Access restricted to certain file sharing websites' (*TalkTalk)* <http://help2.talktalk.co.uk/access-restricted-certain-file-sharing-websites> accessed 14 January 2016

The Drum, 'Ad for Creative Content UK' (*YouTube,* 23 October 2015) <https://www.youtube.com/watch?v=DWWAFM284Yk> accessed 15 December 2015

The Stationers Company, 'Our History: The Stationers Company Register (1556-1695)' (*The Stationers Company Website*) <https://stationers.org/the-hall-heritage/library-archives/24-the-hall-heritage.html> accessed 17 November 2015

Tortell R, 'The Plural of Anecdote' (*The Plural of Anecdote)* <http://www.pluralofanecdote.com/about.php> accessed 14 January 2016

UCL, 'Gold Statistics' (*UCL Library Services*) <https://www.ucl.ac.uk/library/open-access/statistics> accessed 18 December 2012

––, 'Green Open Access' (*UCL Library Services*) <https://www.ucl.ac.uk/library/open-access/green> accessed 18 December 2015

––, 'Open access: frequently asked questions' (*UCL Library Services)* <https://www.ucl.ac.uk/library/open-access/faqs> accessed 13 January 2016

UCSC Genome Bioinformatics, 'Genocoding Project' (*UCSC Genocoding)* <http://text.soe.ucsc.edu/index.html> accessed 18 December 2015

––, 'Open Letter to Publishers' (*UCSC Genocoding)* <http://text.soe.ucsc.edu/email.html> accessed 11 March 2015

––, 'Progress' (*UCSC Genocoding)* <http://text.soe.ucsc.edu/progress.html> accessed 11 March 2015

United Nations Statistics Division, 'Detailed Structure and Explanatory Notes: ISIC Rev 3.1' (*United Nations Statistics Division*) <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=17> accessed 17 December 2015

––, 'Detailed Structure and Explanatory Notes: ISIC Rev 4.0' (*United Nations Statistics Division,* 2008) <http://unstats.un.org/unsd/cr/registry/isic-4.asp> accessed 17 December 2015

United States Copyright Office, 'Congressional Hearings on the Review of the Copyright Law' (*Copyright.gov*) <http://copyright.gov/laws/hearings/> accessed 9 October 2015

University of Manchester, 'Advice on predatory journals and publishers' (*Open Access at Manchester)* <http://www.openaccess.manchester.ac.uk/checkjournal/predatoryjournals/> accessed 13 January 2016

WIPO, 'Contracting Parties: WIPO Convention' (*WIPO)* <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=1> accessed 15 January 2016

––, 'Contracting Parties: Berne Convention' (*WIPO)* <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=15> accessed 15 December 2015

––, 'Contracting Parties: WCT' (*WIPO*) <http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=16> accessed 15 December 2015

– –, 'Contracting Parties: WPPT' (*WIPO*) <http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=20> accessed 15 December 2015

Working Group on Intellectual Property Rights and Copyright Reform, 'Subject files' (*European Parliament Committees,* 12 January 2016) <http://www.europarl.europa.eu/committees/en/juri/subject-files.html?id=20150128CDT00182> accessed 13 January 2016

Websites

APNIC <http://www.apnic.net/> accessed 22 December 2015

Archive of Our Own <https://archiveofourown.org/> accessed 11 December 2015

BASCA <http://basca.org.uk/> accessed 18 December 2015

BoingBoing <www.boingboing.net> accessed 16 November 2015

British Copyright Council <http://www.britishcopyright.org> accessed 14 December 2015

Budapest Open Access Initiative <http://www.budapestopenaccessinitiative.org/read> accessed 13 January 2016

Cards Against Humanity <https://cardsagainsthumanity.com/> accessed 11 November 2015

Copyright Hub <http://www.copyrighthub.co.uk/> accessed 19 December 2015

Copyright Infringement Portal <http://copyrightinfringementportal.com> accessed 19 December 2015

Craphound <http://craphound.com/> accessed 11 November 2015

Creative Commons <http://creativecommons.org> accessed 18 December 2015

CrossRef <http://www.crossref.org/> accessed 12 January 2016

Directory of Open Access Journals <http://doaj.org/> accessed 13 January 2016

Get It Right From A Genuine Site <https://www.getitrightfromagenuinesite.org/> accessed 15 December 2015

Google Alerts <https://www.google.co.uk/alerts> accessed 16 December 2015

Irish Press Council – Office of the Press Ombudsman <http://www.presscouncil.ie/> accessed 14 December 2015

Journal of Scholarly Publishing, <http://muse.jhu.edu/journal/251> accessed 15 July 2016

List of Court Orders <http://www.ukispcourtorders.co.uk/> accessed 15 July 2015

LIRG Journal <http://www.lirgjournal.org.uk/lir/ojs/index.php/lir> accessed 24 August 2016

Lumen Database <https://lumendatabase.org/> accessed 23 September 2015

MarkMonitor <https://www.markmonitor.com/> accessed 19 December 2015

PLSclear <http://www.plsclear.com/> accessed 18 December 2015

PLSclear TDM <http://plsclear.com/Pages/ClearTDMWizard.aspx> accessed 26 March 2015

Publishing Research Quarterly, <http://www.springer.com/social+sciences/journal/12109> accessed 15 July 2016

Remove Your Media <http://www.removeyourmedia.com/> accessed 23 September 2015.

SHARP <http://www.sharpweb.org/main/> accessed 15 July 2016

Stop SOPA Ireland <http://stopsopaireland.com/> accessed 14 January 2016

Takedown Piracy <http://takedownpiracy.com/> accessed 23 September 2015.

The Content Map <http://www.thecontentmap.com/> accessed 15 December 2015

Other Sources

– –, 'Letter from participants in response to "Licences for Europe- A Stakeholder Dialogue" text and data mining for scientific research purposes workshop' (February 2013)

– –, *Index Librorum Prohibitorum*, 1559

Conversation between author and Publishers Association Digital Infringement Manager, Claire Anker, 2 September 2015 3pm

Conversation between author and PLS Deputy Chief Executive and Head of Business Development, Jonathan Griffin, 20 August 2015 11am

Kaplan DA, 'The End of History?' *Newsweek*, 25 December 1989

Twain M, 'Mark Twain's Notebook', 1902-1903

Appendix I: Master List of UK SIC 2007 Codes

18000 Printing and reproduction of recorded media

18100 Printing and service activities related to printing

18110 Printing of newspapers

18120 Other Printing

18121 Manufacture of printed labels

18129 Printing (other than printing of newspapers and printing on labels and tags) n.e.c.

18130 Pre-press and pre-media services

18140 Binding and related services

18200 Reproduction of recorded media

18201 Reproduction of sound recording

18202 Reproduction of video recording

18203 Reproduction of computer media

46490 Wholesale of other household goods

46499 Wholesale of household goods (other than musical instruments) n.e.c. (2003 51479 books only)

47590 retail sale of furniture, lighting equipment and other household articles in specialised stores*

47591 Retail sale of musical instruments and scores in specialised stores (scores only)

47610 Retail sale of books in specialised stores

47620 Retail sale of newspapers and stationery in specialised stores

47630 Retail sale of music and video recordings in specialised stores

47780 Other Retail sale of new goods in specialised stores*

47781 Retail sale in commercial art galleries

47789 Other retail sale of new goods in specialised stores (other than by opticians or commercial art galleries), n.e.c (picture framing)

58000 Publishing Activities

58100 Publishing of books, periodicals and other publishing activities

58110 Book publishing

58120 Publishing of directories and mailing lists

58130 Publishing of newspapers

58140 Publishing of journals and periodicals

58141 Publishing of learned journals

58142 Publishing of consumer, business and professional journals and periodicals

58190 Other publishing activities

58200 Software Publishing

58210 Publishing of computer games

58290 Other software publishing

59000 Motion picture, video and television programme production, sound recording and music publishing activities

59100 Motion Picture, video and television programme activities

59110 Motion Picture, video and television programme production activities

59111 Motion picture production activities

59112 Video production activities

59113 Television programme production activities

59120 Motion picture, video and television programme post production activities

59130 Motion Picture, video and television programme distribution activities

59131 Motion picture distribution activities

59132 Video distribution activities

59133 Television programme distribution activities

59140 Motion picture projection activities

59200 Sound recording and music publishing activities

60100 Radio broadcasting

60200 Television programming and broadcasting activities

61100 Wired telecommunications activities

61200 Wireless telecommunications activities

61300 Satellite telecommunications activities

61900 Other telecommunications activities

62000 Computer programming, consultancy and related activities

62010 Computer programming activities

62011 Ready-made interactive leisure and entertainment software development

62012 Business and domestic software development

62020 Computer Consultancy activities

62030 Computer facilities management

62090 Other information technology and computer service activities

63000 Information service activities

63110 Data processing, hosting and related activities

63120 Web portals

63910 News agency activities

63990 Other information service activities n.e.c.

73110 Advertising agencies

73120 Media representation

74100 Specialised design activities (graphic design)

74200 Photographic Activities

74201 Portrait photographic activities

74202 Other specialist photography (not including portrait photography)

74203 Film processing

74209 Other photographic activities (not including portrait and other specialist photography and film processing) n.e.c.

74300 Translation and interpretation activities

77220 Renting of video tapes and disks

78100 Activities of employment placement agencies

78101 Motion picture, television and other theatrical casting

79900 Other reservation serice and related activities

79909 Other reservation service and related activities (not including activities of tourist guides) (theatre ticket agency)

90010 Performing arts

90020 Support activities to performing arts

90030 Artistic creation

90040 Operation of arts facilities

91010 Library and archive activities

91011 Library activities

93290 Other amusement and recreation activities (2003 92341 Dance hall)

94120 Activities of professional membership organisations

Appendix II: Data

	2010 (aGVA)	Less double counting	2011 (aGVA)	Less double counting	2012 (aGVA)	Less double counting
	£ million		£ million		£ million	
18000	5,087		5,337		4,964	
18100	4,915		5,190		4,858	
18110	44	44	69	69	40	40
18120	4,203	4,203	4,465	4,465	4,177	4,177
18130	527	527	552	552	516	516
18140	142	**142**	104	104	125	125
18200	172	**172**	146	146	106	106
46490	2,507		2,681		2,287	
46499	2,470					
47610	280	**280**	461	461	188	188
47620	1,068	**1,068**	1,606	1,606	983	983
47630	187	**187**	308	308	63	63
47780	4,199				3,962	
47781	203	**203**	112	112	325	325
58000	10,268		10,812		10,593	
58100	9,500		9,178		9,501	
58110	2,261	2,261	1,919	1,919	2,186	2,186
58120	29	29	19	19	44	44
58130	2,325	2,325	2,179	2,179	2,279	2,279
58140	4,093	4,093	4,015	4,015	3,958	3,958
58190	792	792	1,046	1,046	1,033	1,033
58200	768		1,004		1,092	
58210	95	95	174	174	158	158
58290	672	672	830	830	934	934
59000	3,568		4,715		4,674	
59100	3,223		4,016		4,016	
59110	664	664	1,368	1,368	805	805
59120	367	367	806	806	943	943
59130	1,710	1,710	1,565	1,565	1,703	1,703
59140	483	483	505	505	564	564
59200	344	344	471	471	658	658
60000	4,023		4,924		5,031	

60100	486	486	482	482	626	626
60200	3,537	3,537	4,442	4,442	4,404	4,404
62000	35,808		37,226		39,695	
62010	7,703	7,703	9,423	9,423	9,593	9,593
62020	18,521	18,521	17,245	17,245	19,867	19,867
62030	30	30	63	63	36	36
62090	9,555	9,555	10,494	10,494	10,199	10,199
63000	6,727		7,277		7,126	
63110	3,711	3,711	4,268	4,268	4,320	4,320
63120	330	330	407	407	611	611
63910	2,187	2,187	2,117	2,117	1,763	1,763
63990	498	498	486	486	431	431
73110	4,863	4,863	5,720	5,720	6,553	6,553
73120	954	954	1,523	1,523	1,505	1,505
74100	2,049		2,504		2,500	
74200	726	726	819	819	776	776
74300	80	80	108	108	124	124
77220	138	138	*	*	1	1
78100	5,562		6,842		3,667	
78101	*	*	-	-		*
79900	450		374		460	
79909	425		*	*		*
90000	3,039		3,633		3,883	
90010	1,234	1,234	1,418	1,418	1,515	1,515
90020	142	142	281	281	325	325
90030	1,474	1,474	1,754	1,754	1,848	1,848
90040	189	189	180	180	195	195
91010	116		-25		-67	
91011	44	44	-39	-39		*
93290	684		518		519	
94120	1,202		829		991	
Total		77,063		83,911		86,480
Blue Book Total		1,327,923		1,360,925		1,383,082
% of GDP		5.80%		6.17%		6.25%